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ONE HUNDRED AND FORTIETH SESSION

1917

VOL. XXVIII.—Nos. 50 AND 51

ALBANY
J. B. LYON COMPANY, PRINTERS
1917

STATE OF NEW YORK

STATEMENT

OF

**Pardons, Commutations and
Reprieves Granted by
the Governor
1916**

TRANSMITTED TO THE LEGISLATURE APRIL 4, 1917

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1917**

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IN SENATE

APRIL 4, 1917
—

Statement of Pardons, Commutations and Reprieves Granted by the Governor in 1916

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STATE OF NEW YORK

EXECUTIVE CHAMBER

ALBANY, *April* 4, 1917.

To the Legislature:

I have the honor to transmit herewith a statement of the pardons, commutations and reprieves granted by me during the year 1916.

CHARLES S. WHITMAN.

PARDONS, COMMUTATIONS AND REPRIEVES

PARDONS

April 20. Francisco Marino. Sentenced March 3, 1916; county, New York; crime, practicing medicine without a license; term, sixty days; New York Penitentiary.

This pardon was granted upon the recommendation of Judges O'Keefe, McInerney and Garvin, composing the Court of Special Sessions; and a petition of over five hundred citizens requesting that the man be released.

August 25. Richard Roe, whose right name is Dudley Rogers. Sentenced November 2, 1899; county, Oneida; crime murder second degree; term, life; Clinton Prison.

Roe is over seventy years of age and has served over seventeen years in prison.

It appears from the record that Roe and two others committed a burglary near Utica, in 1898, taking about \$122.00 in money. Shortly after the burglary, they attempted to take a horse and cutter from a barn, when they were seen by a woman in a house nearby, who notified the hired man. This hired man, named John Mooney, levelled a gun at them. A shot was fired by Sullivan, alias John Doe, who was with Richard Roe, which caused the death of Mooney.

John Doe was caught soon thereafter and in May, 1899, was tried before the Honorable Pardon C. Williams. He was convicted of murder in the second degree and sentenced to life imprisonment and died during 1914 at Clinton Prison.

Five months after the conviction of Sullivan, alias John Doe, the prisoner, known as Richard Roe, was convicted and sentenced to life imprisonment.

The Honorable Timothy Curtin, the district attorney of Oneida county, at the time Roe was convicted said:

“ I was District Attorney of Oneida county at the time of the conviction of Dudley Rogers (alias Richard Roe) and John Doe, otherwise known as “ Con ” Sullivan for the

shooting of a farm-hand in the town of Paris, in this county. There was one shot fired and at the time of the trial, it was not known which of the two fired the shot. Neither of them testified as a witness on the trial. I have learned since the trial, upon reliable authority, that it was Sullivan who fired the shot. The theory upon which both of the defendants, John Doe and Richard Roe were convicted, there being but one shot fired, was that they were engaged in the commission of a felony immediately prior to, or at the time of the shooting.

I believe that Mr. Rogers (alias Richard Roe) has been punished sufficiently, and I assume that he must be a very old man. It is my belief that the Pardoning Board will not make a mistake if they should grant him a pardon."

In view of the recommendations of the district attorney who prosecuted the man at the time of his trial, I have determined that it was a proper case for the exercising of clemency and have accordingly issued a pardon.

September 5. Robert G. Kelsey. Sentenced April 3, 1914; county, Kings; crime, grand larceny, 1st degree; term, two years six months, minimum, five years, maximum; Sing Sing Prison.

Kelsey's minimum term would expire on October 1, 1916, and he has only twenty-five more days to serve.

The judge before whom Kelsey was tried has recommended executive clemency. Kelsey's conduct in prison has been good. He has an aunt who has stood by him through all of his trouble and who is now dangerously ill. In view of the recommendation of the judge, together with his prison conduct and his aunt's illness, and of the few days which he has yet to serve on his minimum term, I have determined that it is a proper case for the exercise of clemency and have therefore issued a pardon.

November 29. Mary Jennings. Sentenced October 21, 1901: county, New York; crime, murder second degree; term, twenty years, minimum, life, maximum; Auburn Prison.

I have been advised by persons interested in this case that if she were liberated that they would look after her.

The crime for which she was convicted grew out of a dispute with another woman who was working in Child's restaurant.

During the dispute Mary Jennings stabbed one Katy McVeight with a knife, from which she subsequently died.

There has always been a question as to whether Mary Jennings should not have been convicted of manslaughter instead of murder, and in view of the doubt in the matter, and she having served a much longer period than she would have served had she been convicted of manslaughter, I have accordingly pardoned her.

December 21. William J. Cummins. Sentenced November 24, 1911; county, New York; crime, grand larceny, first degree; term, four years eight months, minimum, eight years eight months, maximum; Great Meadow Prison.

I have decided to grant the application of William J. Cummins for a pardon. Inasmuch as Mr. Cummins was convicted under my prosecution while I was district attorney of New York county, I deem it proper to state my reasons for granting this pardon.

I have never had any doubt of the guilt of Cummins, and it might well be, under ordinary circumstances, that an Executive with such a view would content himself with allowing the sentence imposed to be served in full. However, I am not unmindful of the reasons why the pardoning power has been granted to the executive, and accordingly I have given great care to the examination of Cummins' petition and the recommendations of those who support it, to the end that I might so far as possible impartially performed my duty aside from my former association with the case.

He was convicted of having illegally applied moneys to his own use in connection with the operations of himself and his friends in control of the Carnegie Trust Company, the Van Norden Trust Company and the Nineteenth Ward Bank of the city of New York. For this offense he was sentenced to a term of four years and eight months, and he has now spent in jail and in the State's Prison about three years and two months. Letters and petitions asking his pardon have been presented by people from almost every state in the Union. Virtually the great State of Tennessee has as one man asked for Mr. Cummins' pardon, for I find among the petitioners its Governor and ex-Governors, all of its State officials, its United States Senators, all of its Congressmen, practically all of its leading merchants, manufacturers, bankers, and

many of its judges. I find the Senators of several other states, among them the Hon. Oscar W. Underwood and F. P. Glass. I find the Governors of Arkansas, Alabama and Missouri. There are also among the petitioners representatives of the largest manufacturing and business interests of the United States. In his early life Cummins represented some of the largest of these houses in the south, and they all speak highly of him. Lawyers of the city of New York and all parts of the United States, as well as judges of the United States Courts, cabinet officers, congressmen and other officials of many states, and the clergy of various sects, speak in the highest terms of Mr. Cummins as a man. Nearly all of these people have been associated with him either socially or in business. Delegation after delegation has come from all parts of the United States to ask his pardon.

I mention all of these things not because they are controlling with me but because I believe, that even though a man has done wrong, as I believe Mr. Cummins did, the fact that in his entire business life outside of the situation which resulted in his downfall he has conducted himself in such a way as to command the respect and support of his associates, should have great weight. His offense was a serious one, but he has been severely punished. Almost any term of imprisonment for a man of his standing would have been a woeful punishment and a warning to others. Cummins was not a banker, and his inexperience may, in a measure, mitigate his offense, but it would never do to excuse men who misuse the funds of banks simply on account of their ignorance.

The man who suffered the greatest personal loss from the failure of the Carnegie Trust Company was Mr. Andrew Carnegie, who lost in the neighborhood of two million dollars.

Mr. Andrew Carnegie under date of March 12, 1914, communicated with me in reference to the case, and in his communication he states:

“ I have never asked a Governor to pardon anyone and I do not ask you do so. On the other hand, I feel that it is due to Mr. Cummins to say that I do not believe he knowingly broke the law. He had no experience in banking, and as the facts showed, Mr. Clark Williams, head of the State Banking Department, had agreed to take the Presidency of a union of

three banks, one of which was the Carnegie Trust Company. The published evidence shows that I made the Trust Company a loan of \$2,000,000 5 per cent bonds on the statement of Mr. Williams that I would be doing a public service. I felt sure that if so able and trust-worthy a man as Mr. Williams were at the head of the proposed consolidation he would not fail to make it a success. Unfortunately, the scheme did not mature.

“ Mr. Cummins has many friends and he is very popular wherever known, and I believe he broke the laws unknowingly if at all. He is a kind husband and father and has a family around him which are the best, and he has hosts of friends, many of whom came to see me from the South. He stands well among his neighbors.”

The principal representative of the institutions other than the Carnegie Trust Company which were involved in the whole affair was Mr. Bradley Martin, President of the Nineteenth Ward Bank and Vice President of the Van Norden Trust Company. It was upon his testimony principally that Mr. Cummins was convicted. Mr. Martin has also joined in the application, as have many other directors and persons who suffered loss. Ten of the trial jurors who convicted Mr. Cummins have also united in the petition.

Mr. Justice Davis who presided at the trial of Mr. Cummins, under date of December 13, 1916, writes me as follows:

“ In answer to your letter referring to the application of William Cummins for executive clemency, I beg to state that I have no objection to the granting of the application.

“ I think Cummins has served about thirty-eight months of his term. If I am right on this point, it would seem that the ends of justice had been served in Cummins' case.

In fact, I think that the testimonials, which have been presented, have never been equalled in number or fervor on behalf of a man in prison petitioning for pardon in this State.

In considering this application, the executive must regard the opinions and feelings of those men whose good faith cannot be questioned, and it is my opinion, and this is shared by the distin-

guished judge who presided over the trial, with whom I have consulted, that the interests of justice will be served by granting the application.

Another thing which has had great weight with me is Mr. Cummins' conduct since the failure of the Carnegie Trust Company. He and his family have given up everything they had, and he has energetically devoted himself, both while in prison and before confinement, to the assistance of the Banking Department in collecting assets of the defunct institution.

December 22. Alfred F. Market. Sentenced March 23, 1916; county, Onondaga; crime, forgery, second degree; term, one year, minimum, one year two months, maximum; Clinton Prison.

Market's minimum term of one year has practically expired and he has been paroled by the Parole Board to leave prison on January 4, 1917.

In view of this fact I have determined that the ends of justice will be substantially met by granting a pardon in this case.

December 22. Frank G. Todaro. Sentenced December 8, 1914; county, Oneida; crime, blackmail; term, five years, minimum, nine years six months, maximum; Great Meadow Prison.

This pardon is granted upon the recommendation of Judge Hazard who writes as follows:

"I am frank to say that if the case were left with me to decide, and if I were to give the doctrine of reasonable doubt any application at all, that I do not believe I should have convicted Todaro.

"I do not know as I can say more, and if you feel that it is a proper case to give the defendant the benefit of a doubt, I have already indicated that in my opinion he may be entitled to it."

This report is under date of October 26, 1916.

In view of the attitude of Judge Hazard in this case and the fact that this man has served over two years on his minimum sentence, I have determined that it is a proper case for the exercise of executive clemency and have accordingly issued this pardon.

COMMUTATIONS

January 6. William Keenan. Sentenced January 26, 1903; county, Kings; crime, burglary, first degree; term, twenty-seven years; Clinton Prison.

Commuted to twelve years, eleven months, ten days, minimum, twenty-seven years maximum.

Robert A. Ray. Sentenced January 26, 1903; county, Kings; crime, burglary, first degree; term, twenty-seven years; Clinton Prison.

Commuted to twelve years, eleven months, ten days, minimum, twenty-seven years, maximum.

Keenan and Ray were convicted in Kings county of burglary first degree, and sentenced by Judge Crane on January 26, 1903, to Sing Sing Prison for a term of twenty-seven years.

The commutations of sentence in both cases are recommended by Judge Crane, who writes to a former Governor under date of June 25, 1914, as follows:

“In my opinion these men have served a long time and are now much older and probably much wiser and it would be a proper thing to give them some encouragement to decent living if their sentence could be so commuted that for a while after they were released from prison they would be under the surveillance of the Board of Parole.”

Judge Crane has also made practically the same recommendation in a report under date of September 20, 1915.

The district attorney of Kings county on May 15, 1914, recommended that the sentences of Keenan and Ray be commuted so that they might be released by the Board of Parole.

In view of the above recommendations, and upon the assurance of Major Thomas Cowan of the Salvation Army that these men would be furnished employment, upon their release, I have commuted their sentences.

January 25. Charles L. Dubelier. Sentenced March 27, 1914; county, New York; crime, bribery; term, two years eight months, minimum, four years six months, maximum; Sing Sing Prison.

Commuted to one year, nine months, twenty-three days, minimum, four years six months, maximum.

This commutation is granted upon the recommendation of Judge Davis and District Attorney Perkins.

District Attorney Perkins in his report states as follows:

“I am informed that Dubelier's conduct in prison has been good and I believe, if it meets with your approval, that the interests of justice will be conserved by a commutation of the sentence heretofore imposed to equal the time that the prisoner, Charles Dubelier, has already spent in prison, and that he be placed under the jurisdiction of the State Board of Parole.”

The judge concurs in the above recommendation.

February 3. Charles Solomon. Sentenced January 17, 1913; county, New York; crime, attempted bribery; term, two years, minimum, four years six months, maximum; Sing Sing Prison.

Commuted to one year, six months, three days, minimum, four years, six months, maximum.

Solomon's minimum term would expire on July 29, 1916, when he would then be eligible for parole.

The commutation is granted upon the recommendation of the district attorney of New York County and of Judge Goff who presided at the trial.

The judge writes under date of January 27, 1916, that he is satisfied from affidavits which have been presented to him that the prisoner's health is in bad condition and that his wife and children are practically speaking destitute, and inasmuch as Solomon has served the greater portion of his minimum sentence, and also owing to fact that his wife and children are in such a lamentable condition, and that the interests of public justice have been substantially satisfied, he feels justified in recommending clemency in this case.

February 8. Andrew M. Rule, alias George M. Loder. Sentenced November 13, 1914; county, New York; crime, forgery, second degree; term, one year; New York Penitentiary.

Commuted to one year, two months, twenty-four days.

This commutation is recommended by Judge Charles C. Nott, Jr., who presided at the trial, and by District Attorney Perkins.

The judge's report is a concise statement of the case and is as follows:

"I beg to state that this defendant pleaded guilty of forgery in the second degree and was sentenced by me under the following circumstances:

"After his plea he testified as a witness for the people upon the trial of an indictment against other defendants in the same case and gave testimony which was important, and I believe true. It appeared that he had been previously convicted of crime in this State, and that he would have, upon a new sentence to States Prison, nearly two years' time to serve on the prior conviction. In view of his services to the State, I sentenced him to one year in the penitentiary upon his present plea, being then under the impression that if he were not sentenced to States Prison he would not have to serve the additional two years due the State. It appears, however, that he has now served his term in the penitentiary and must now serve the additional year and five months. I having sentenced him to the penitentiary on his plea, in my opinion on account of his services rendered to the State, it would be proper for him to receive executive clemency as to the year and five months he is now serving on his old sentence."

February 8. Wendell P. Pearce. Sentenced December 22, 1914; county, New York; crime, grand larceny, second degree; term, two years, minimum, three years six months, maximum; Great Meadow Prison.

Commuted to one year, one month, fifteen days.

This commutation is granted upon the recommendation of Judge James T. Malone who presided at the trial and District Attorney Perkins.

The district attorney in his report makes the following recommendation:

"The evidence disclosed that the prisoner was employed by the Western Union Telegraph Company in this city when in March, 1912, he stole \$129.55 from said company and absconded. Some time later he was arrested and brought to New York City for trial.

“While a fugitive from justice, the prisoner found employment with a concern in Detroit, Michigan, known as Sommers Bros. Match Company. Mr. Frank F. Sommers, one of the firm, interceded in behalf of the prisoner at the time of sentence and since that time has stated that he will re-employ the prisoner and will aid in restitution of his defalcations.

“I have conferred with Judge Malone, who sentenced the prisoner, and he is of the opinion that the imprisonment the prisoner has undergone at the present time is sufficient punishment for him and that he recommends clemency, and I desire to join with him in the said recommendation.”

The judge concurs in the above report of the district attorney.

February 18. Robert Cochrane. Sentenced March 23, 1911; county, Erie; crime, maiming; term, nine years six months; Auburn Prison.

Commutated to three years, eight months, seventeen days, minimum, nine years, six months, maximum.

This commutation is granted upon the recommendation of District Attorney Dudley and numerous petitions which are on file with the case.

District Attorney Dudley in his report states as follows:

“Cochrane was indicted in this county on September 20, 1910, for maiming. At the same time indictments were found against Harry Moran and Joseph Meyers, alias Armstrong, for the same offense. Meyers was tried and convicted and on November 21, 1910, sentenced to Auburn Prison for six years, minimum and thirteen years and six months, maximum. April 24, 1911, Moran pleaded guilty to assault, second degree, and was sentenced to Auburn Prison for two years six months, minimum and five years maximum. Cochrane was placed on trial on February 14, 1911, and February 21st was found guilty by a jury and on March 23, 1911, was sentenced to Auburn Prison for nine years and six months. At the time of the finding of the above indictments Jack Norton and Paddy Jones were jointly indicted with Meyers, Cochrane and Moran for robbery, first degree, but this indictment was dismissed on December 3, 1912.

“In the spring and summer of 1910 the men employed on the boats sailing from this port went on strike and during that time there was considerable labor disturbance along the docks and water fronts. The boat owners and the Lake Carriers Association filled the places of the strikers with non-union men, and various conflicts between these different interests took place. Among the non-union men employed was one Edward A. Fraser, who came from Canada, and was employed as a fireman on the Minneapolis, a steamship arriving at this port on June 26, 1910. Fraser left the boat on its arrival here, and in going about town met the defendants in a saloon on lower Main street, this city, on June 27th, in the early evening. He swore that they took him over in the yards nearby and cut off one of his ears and cut his leg, and he also swore they stole from his person some \$15 in money, a Lake Carriers' Association book, some revenue stamps which he had and a \$10 Confederate bill. The defendants were subsequently apprehended and a jackknife which Fraser claimed was found in a room which was occupied by Meyers in New York city; the revenue stamps were also found which Fraser claimed were his under a carpet in a room which Meyers had occupied in Buffalo. A short time after Meyers was committed to Auburn Prison there was an explosion in the boiler room there in which Meyers was burned and died soon afterwards. Cochrane remained in the Erie county jail after his conviction for nearly one year before the case was decided by the appellate courts. In the meantime the other two defendants pleaded guilty and were sentenced, Moran receiving a sentence of two years and six months as stated, and Norton receiving a sentence of three years and six months, which will expire the 28th of this month. It was shown by some witnesses on the trial that these defendants were all in the barroom of this saloon on lower Main street. The evidence found was in Meyers' possession. Their association in this saloon had more to do with connecting Moran, Norton and Cochrane than any other fact. I feel that the sentence of Cochrane, Moran and Norton ought to be about the same. Cochrane has served up to this time

nearly three years; he was also confined in the Erie County jail, as stated above, nearly one year before starting to serve his sentence in Auburn, making his present term of imprisonment nearly four years.

“Under these circumstances I am of the opinion that Cochrane has served a sufficient length of time as compared with the term of imprisonment of the other defendants and that if he receives executive clemency at this time it would only be doing justice to this particular defendant. Moran has served his time and is out on parole; I suppose that Norton will undoubtedly be paroled the latter part of this month, so that I believe Cochrane is entitled to a parole or pardon, taking into consideration the sentences of his associates.”

March 9. Gaetano Genovese. Sentenced February 22, 1911; crime, murder, second degree; term, twenty years, minimum, life, maximum; Auburn Prison.

Commuted to five years, one month, minimum, twenty years maximum.

This commutation is granted upon the recommendation of Hon. William W. Clark, the judge who sentenced him and the district attorney.

March 9. Louis Rubkuf. Sentenced May 29, 1914; county, New York; crime, attempted grand larceny, second degree; term, two years six months; Sing Sing Prison.

Commuted to one year, nine months, nine days.

March 9. Charles Bloom. Sentenced May 29, 1914; county, New York; crime, attempted grand larceny, second degree; term, two years six months; Sing Sing Prison.

Commuted to one year, nine months, nine days.

Judge Malone who presided at the trial and the district attorney recommend clemency in these cases. The district attorney states that both of the men rendered valuable service in the prosecution of other cases and by reason thereof should receive clemency.

March 16. Edward Bernstein. Sentenced February 28, 1908; county, New York; crime, burglary, first degree; term, ten years three months, minimum, ten years six months maximum; Clinton Prison.

Commutated to eight years, twenty-two days minimum, ten years, six months, maximum.

This case is recommended by Judge Crain who presided at the trial and by the district attorney who prosecuted the case.

March 16. Henry H. Browne. Sentenced March 23, 1906; county, New York; crime, forgery, first degree; term, twenty years; Sing Sing Prison.

Commutated to eight years, five months, sixteen days, minimum, twenty years, maximum.

This commutation is granted upon the recommendation of Judge Foster who presided at the trial and former District Attorney Jerome who prosecuted the case.

Brown has served over eight years of his sentence and has been a model prisoner. For years he has been editor of the Star of Hope, a prison paper published at Sing Sing Prison.

March 16. William A. Whipple. Sentenced May 20, 1913; county, Monroe; crime, manslaughter, first degree; term eight years, minimum, fifteen years, maximum; Auburn Prison.

Commutated to two years, nine months, twenty-three days, minimum, fifteen years, maximum.

This commutation is recommended by the judge who presided at the trial and by the district attorney who prosecuted the case.

March 16. William H. Young. Sentenced February 17, 1896; county, Montgomery; crime, murder, first degree; his sentence was commuted by Governor Black on March 10, 1897, to life imprisonment. Clinton Prison.

Commutated to twenty years, minimum, life, maximum.

This commutation was virtually a punishment which at that time was imposed for murder, second degree. Since 1987 a law punishing murder, second degree, by a minimum term of twenty years, has been enacted, allowing a person to be released by parole at the end of that period.

Young has served twenty years and one month imprisonment, and I have commuted the sentence to a minimum term of twenty years and a maximum of life, making Young eligible to appear before the Board of Parole at its next meeting at Clinton Prison on March 20, 1916.

March 24. William Flack. County, New York; crime, murder, first degree; sentenced to be executed; Sing Sing Prison.

Commuted to life imprisonment.

This commutation is recommended by Judge Crain who presided at the trial of Flack and by former District Attorney Perkins who prosecuted him.

It is also recommended by all of the living jurors who convicted Flack and by the jury who convicted Leggio; also by Judge Nott who presided at the trial of Leggio and by District Attorney Swann.

Flack was convicted of shooting and killing one Giuseppe Marino. He had no personal interest in the murder but committed it at the instigation of Angelo Leggio, who was actuated by jealousy through Marion's intimacy with Louisa Macaluso, a sweetheart of Leggio's. Prior to Flack's trial he made three confessions admitting that he fired the fatal shot. Upon the trial, however, he denied that he had committed the crime and claimed that the confessions had been extorted from him by police brutality. The Macaluso girl also testified on the trial as an eye witness to the shooting and claimed that Flack had fired the fatal shot. The conviction of Flack was subsequently affirmed by the Court of Appeals. Prior to the argument, however, Flack confessed to Father Cashin, Chaplain of Sing Sing Prison, that he had committed the crime and had testified falsely on his trial, as he did not want to compromise any other persons in the commission of the crime, but inasmuch as he had been convicted and must pay the death penalty, he desired to free his conscience, and requested an interview with the district attorney, which was accorded him, and pursuant to a law which was passed and signed in 1915, allowing a prisoner to be brought from the death house to testify in a murder case, a writ of habeas corpus was obtained for the prisoner and he was brought from prison to the county of New York and testified against Angelo Leggio who had been indicted for murder, first degree.

The prisoner corroborated the Macaluso girl in every detail and testified that he had met Leggio and a man named Patsy about two weeks prior to the commission of the crime and that Leggio had told him that he wanted Marino to be put out of the way and that he would pay the prisoner \$200.00 for committing the

crime. That on the night in question the three of them went to the room of the Macaluso girl to see whether Marino was present and staid about ten minutes, when they left. They returned in about two hours, burst in the door and Flack fired the shot which killed Marino.

Subsequent to the conviction of Leggio, he appealed his case to the Court of Appeals and the judgment of conviction was affirmed by said court, on the 13th day of January, 1916. Leggio committed suicide in the death house at Sing Sing Prison by hanging himself.

Flack is a boy of twenty-two years of age, while Leggio was about thirty-two, and whose mind dominated the mind of Flack, Flack being of inferior mentality. Previous to the trial of Flack a plea of manslaughter would have been accepted but on the advice of counsel the prisoner stated he refused the same.

In view of the history of this case as above recited and in furtherance of justice and being actuated by numerous recommendations made by every official connected with the trial of Flack and the trial of Leggio, I have determined that this is a proper case for the exercise of executive clemency and have acted accordingly.

March 27. Anthony Mareno. Sentenced April 7, 1908; county, New York; crime, robbery, first degree; term, twelve years six months, minimum, sixteen years six months, maximum; Sing Sing Prison.

Commuted to seven years, eleven months, eighteen days.

I have been advised by competent physicians that this man is suffering from advanced stages of pulmonary tuberculosis. I have also been assured by persons interested in Mareno that he will be taken care of immediately upon his release.

April 6. Antonio Caitoto. Sentenced April 17, 1908; county, Wyoming; crime, manslaughter, first degree; term, twelve years, minimum, twenty years, maximum; prison, Auburn.

Commuted to seven years, eleven months, fourteen days, minimum, twenty years, maximum.

This case is recommended for executive clemency by Judge Norton who presided at the trial and by the district attorney of Wyoming county.

April 12. Joseph E. Topper. Sentenced May 20, 1914;

county, New York; crime, attempted extortion; term, two years six months, minimum; five years, maximum; Sing Sing Prison.

Commuted to one year, ten months, eight days, minimum, five years, maximum.

This commutation is recommended by Judge Wadhams who presided at the trial and District Attorney Perkins.

April 17. Teresa Marino. Sentenced March 12, 1914; county, Monroe; crime, manslaughter, second degree; term, five years, minimum, ten years three months, maximum; Auburn Prison.

Commuted to two years, one month, eleven days, minimum, ten years, three months, maximum.

This commutation of sentence is recommended by Judge Clark who presided at the trial and by the district attorney who prosecuted the case. Both of these officers state that the time this woman was kept in the jail in Monroe county, together with the time spent in Auburn Prison is over three years, and they believe that she has been sufficiently punished.

May 10. Antonio La Salle. Sentenced April 6, 1915; county, New York; crime, murder, second degree; term, twenty years, minimum, life, maximum; Sing Sing Prison.

Commuted to seven years, six months, minimum, life, maximum.

May 10. Joseph La Salle. Sentenced April 12, 1915; county, New York; crime, murder, second degree; term, twenty years minimum, life, maximum; Sing Sing Prison.

Commuted to seven years, six months, minimum, life, maximum.

These commutations of sentence are recommended by former District Attorney Perkins of New York county who stated that both of the men had rendered such valuable service to the State in other important murder trials that without their testimony it would have been impossible for the district attorney to have successfully prosecuted the cases and obtained a conviction.

The district attorney also informs me that at the time these men were placed upon trial that he would have been willing to have accepted a plea of guilty of manslaughter, first degree, because he did not at that time think that he had sufficient evidence to convict them on the murder charge.

If these men had been convicted of manslaughter, first degree, they could not have received a sentence which would have exceeded

a maximum of twenty years, and it would have been the duty of the court if they were so convicted to have imposed an indeterminate sentence, with a minimum and maximum penalty of twenty years.

In view of these facts and upon the recommendation of former District Attorney Perkins, I have concluded to commute the sentences as above stated.

May 26. Francis J. Fowler. Sentenced March 2, 1915; county, Suffolk; crime, murder, first degree; sentenced to be executed; Sing Sing Prison.

Commuted to life imprisonment.

Fowler was convicted of murder, first degree, in Suffolk county, for killing one Frank Sammis, in March, 1915.

Judge Kelly who presided at the trial of Fowler makes the following recommendation:

“While the defendant is guilty of the homicide, and sane, under the provisions of the law, as found by the jury, I consider it my duty to say to you, that in my opinion, a commutation of the sentence to imprisonment for life would be a merciful disposition of his case, and would, I think, fulfill the requirements of justice for the following reasons:

“The defendant is a man of low order of intelligence. He is a ne’er do well — who followed the sea for the greater portion of his life. Coming from a respectable family, he wandered off from his home ties, and his life was dissolute and depraved in every way. These things, of course, do not excuse him in the eyes of the law, but I do not think he was ever convicted of crime before. His surroundings as a sailor and his life as a whole were very unfortunate. He is, I fear, a sexual pervert. He has suffered from all forms of venereal disease, and I fear, has little perception of the dreadful situation in which he is placed. He formed a criminal intimacy with the sister of his employer, the man whom he killed — a woman older than himself, and who encouraged the unfortunate and ignorant defendant, — who was working as a farm hand for her brother. It is difficult to spell out the motive for his crime except from his diseased imagination, and the use of liquor. He is an unfortunate, and has been a wanderer and an outcast for the greater part

of his life. With better surroundings, with better training, I suppose he would have avoided this dreadful catastrophe. It is a case which in my opinion, warrants inquiry by the executive, to ascertain his present condition, and if in the exercise of the great power vested in you, you see fit to give him his life, directing his imprisonment for life instead, I feel that it would be a merciful and proper disposition of the matter. The views here expressed have been my views since the date of the conviction, but I have not wished to intrude them upon you until I was called upon to do so."

In view of above recommendation I deem this a proper case for the exercise of executive clemency and have acted accordingly.

June 13. John A. Kirby. Sentenced December 30, 1914; county, New York; crime, attempted grand larceny, first degree; term, two years six months, minimum, four years six months, maximum; Great Meadow Prison.

Commutated to one year, five months, twelve days.

This commutation is granted at the request of Mr. Robert Hilliard of New York City who was the complainant in the case and who writes me that at the time of Kirby's conviction he thought that he would receive a sentence not greater than six months.

In view of the attitude of the complainant and the fact that he had served the minimum time above mentioned, I have determined it was proper case for commutation and have acted accordingly.

June 17. Arthur S. Martin. Sentenced December 9, 1911; county, Clinton; crime, rape, first and second degrees; term, nine years, minimum, twenty years, maximum; Clinton Prison.

Commutated to four years, six months, ten days, minimum, twenty years, maximum.

This commutation is granted upon the request of the judge who imposed the sentence and the district attorney who prosecuted the case. The district attorney made a report to me, wherein he stated:

"The petitioner, Arthur S. Martin, is a young man of the age of twenty-five years. He was convicted of the crime of rape, first degree and rape, second degree in December, 1911, in the Supreme Court sitting in this county, Mr. Justice Joseph A. Kellogg, presiding. At that time I was district

attorney and handled the case of the people. The applicant was residing at that time and had been for some time before at the village of Lyon Mountain in this county. This is a mining town where the mines of the Delaware & Hudson Railroad Company are located. The population of that town is such as is usually found in mining towns. Martin is a fine looking young man and appears quite intelligent. At the time of his arrest he was a married man. He had left his home in Franklin county and settled in Lyon Mountain. His wife was a widow much older than he. She is a very inferior woman with very little intelligence and of a very much lower type than Martin. That seems to be the unfortunate incident in his life as far as an outsider is permitted to judge in such things. Martin associated in Lyon Mountain with some people who were of much lower class than himself. I mean by this of lower intelligence and of quite a different manner of living. You will note in the petition the name of one John Bratt. This man Bratt took quite a prominent part in this case. Martin's wife had a daughter by former marriage. In 1911 she was about 16 years of age. She lived with her mother and the petitioner. The petitioner's wife had other younger children living in the same household. Bratt was himself an ex-convict and had served a term in State Prison and was living in Lyon Mountain. He was quite active in the prosecution of the petitioner. At the time of the prosecution I wondered at his zeal and his interest in this girl and in her mother, the wife of the petitioner.

“ This can be explained perhaps by the statements contained in the affidavit of Leafey Elliott verified June 7, 1912, and on file with you. Of course, I cannot vouch for the truth and accuracy of all of the statements in this affidavit, but my recollection is that it is substantially correct. It is a fact that there was some interference of some kind by Bratt in the family affairs of the petitioner. Martin's wife and this girl did go back and forth from the Martin household to the household of Bratt. I have no knowledge of the statements of Bratt mentioned in this affidavit.

"After Martin's arrest which occurred sometime in October, 1911, he was confined in the county jail at Plattsburgh, and on December 8, 1911, an indictment was filed against him charging him with the crime of rape in the first degree. * * * Martin was not represented by counsel during any of the proceedings. The wife and the witness Leafey Elliott and her sister Geneva Elliott were the principal witnesses before the grand jury. At the end of the December term when the indictments were filed, Martin was arraigned before Mr. Justice Joseph Kellogg with the other prisoners. On being asked to plead to the indictment, he entered a plea of guilty and Justice Kellogg sentenced him to a term of nine years and ten months with the maximum twenty years in Clinton Prison.

"Later Mr. William P. Badger of Malone came to see me on behalf of Martin. The matter was not gone into at that time very extensively. A few months ago Mr. A. B. Cooney presented this matter to me again and asked me to go into the case carefully. I have examined the petition and affidavits on file in your office and have written to Martin and discussed the case with Mr. Cooney. You will note in the affidavit of Leafey Elliott, the complaining witness referred to, that she has retracted her accusation made against the defendant. Of course, I recognize that a retraction standing by itself might not be conclusive. As a general principle it might be frequently done in many criminal cases. Standing by itself I would not put much weight upon it on this application, but together with all the circumstances of this case and in justice to the petitioner, it requires me to say to you that I am very doubtful of his guilt.

"I, therefore, recommend to your excellency that the petitioner, Arthur S. Martin, receive executive clemency."

The judge in a complete report which is herein set forth stated as follows:

"This man was sentenced by me to the extreme penalty for the first offense of rape in the first degree.

"He plead guilty and made no explanation, and as a very atrocious crime was disclosed by the minutes before the grand jury I imposed the severest sentence.

"I now find that the principal witness has retracted the charge and County Judge Hogue, then district attorney, being doubtful of the guilt of the petitioner, recommends the exercise of executive clemency.

"As my action was based entirely upon the plea of guilty, which may have been interposed by a man, uneducated and friendless, at the suggestion of his custodians, together with the grand jury minutes, and the statement of the district attorney as to his information concerning the facts, and in view of the very doubtful reliability of the witness as now disclosed, and fearing a possibility that grievous wrong may have been inflicted upon this man, already confined in prison nearly four years, I desire to join with the then district attorney in recommending to your excellency the exercise of executive clemency in this case."

In view of the attitude of the judge who imposed the sentence and the district attorney who prosecuted the case, and of other persons interested in the application, it appeared to me to be a proper case for the exercise of executive clemency and have acted accordingly.

June 22. Michael Lee Eisenberg. Sentenced February 3, 1911; New York county; crime, forgery, second degree; second offense; term, twenty years; Great Meadow Prison.

Commutated to six years, six months, minimum, twenty years, maximum.

The reason for the severe sentence received by Eisenberg was that he had been convicted of a crime, previous to the one he was sentenced for and the judge had no discretion, except to impose the sentence which he did.

In view of the fact that Eisenberg has rendered the State great service while in prison, in performing the services of a dentist, and upon the recommendation of various prison officials, I have commuted his sentence as above stated.

June 22. Joel C. Rundle. Sentenced February 15, 1901; county, Orange; crime, murder, second degree; term, twenty years, minimum, life, maximum; Sing Sing Prison.

Commutated to fifteen years, three months, three days.

This commutation is recommended by the former district attorney of Westchester county, who is now the county judge, and

by the judge who presided at Rundle's trial. The Governor has also been petitioned by many Grand Army Posts of the State to commute the sentence, Rundle having been a veteran of the Civil War. At the present time he is paralyzed and has to be wheeled around in a wheel chair. He has relatives who are anxious and willing to take care of him, and in view of his helpless condition, and of the services he rendered to his country in the Civil War, I have commuted his sentence.

June 28. Antonio Giordano. Sentenced December 28, 1915; county, Monroe; crime, murder, first degree; to be executed; Sing Sing Prison.

Commuted to life imprisonment.

Giordano's sentence was affirmed by the Court of Appeals but two of the judges dissented, they being Chief Judge Bartlett and Judge Hogan.

Chief Judge Bartlett has written to me in regard to this case and says:

"I deem it my duty to inform you of the reasons which led me to dissent. It seemed to me that the facts proved brought the case precisely within the definition of murder in the second degree which contemplates an intentional killing but a killing without premeditation and deliberation but negatived the existence of either element. I therefore reached the conclusion that while the defendant merited conviction of murder in the second degree he should not have been convicted of the higher grade of murder.

"I write this letter in the hope that you may see fit to commute the sentence of Giordano to imprisonment for life."

Judge Hiscock also writes favoring a commutation of sentence and says:

"There was no question that the convicted man killed his victim. There was a very serious question, however, whether he was guilty of that premeditation and deliberation which made his crime murder in the first degree. Two members of the court including the chief judge, dissented from our affirmance on the ground that the evidence did not justify the jury in finding such premeditation and delibera-

tion. The remaining members of the court thought there was sufficient evidence to permit the jury to find the verdict which it did if it took the view of the evidence urged by the people, and that therefore we were not justified in reversing the judgment. All of the members of the court, however, who voted for affirmance, with one or two exceptions felt that they would have been better satisfied if the jury had contented itself with finding a verdict of murder in the second degree, and under these circumstances I was authorized by the members of the court, with one possible exception, to state to you that in their judgment this was a case where you might, if you so chose, very properly exercise the discretion reposed in you to commute the sentence from death to imprisonment."

In view of the attitude of the judges of the Court of Appeals on this question and the statements which have been made to me I deem it my duty to commute the sentence to life imprisonment.

June 28. Henry C. Merritt. Sentenced October 23, 1914; county, Westchester; crime, grand larceny, first degree; term, three years six months, minimum, six years six months, maximum; Sing Sing Prison.

Commuted to two years, minimum, without compensation, six years six months, maximum.

This commutation of sentence is recommended by Judge Morschauser who presided at the trial at the time of conviction, and also by the district attorney of Westchester county, Hon. Frederick E. Weeks.

Judge Morschauser in his report makes the following recommendation:

"After a visit to the prison and knowing the physical condition of Merritt at the time of his conviction and his condition at the present time, by personal observation, I am satisfied that there will be no injustice done to the people of this State by making a commutation of sentence."

The district attorney makes a similar recommendation. Numerous individuals have also taken the same position in reference to this case, and in view of the recommendations on file I have

determined that it is a proper case for the exercise of clemency and accordingly commute the sentence as above stated.

June 28. Gennaro Mazzella or Maziello. Sentenced June, 1915; county, Kings; crime, murder, first degree; to be executed; Sing Sing Prison.

Mazzella or Maziello, convicted in Kings county in June, 1915, of the crime of murder, first degree. His sentence was affirmed by the Court of Appeals and he was sentenced to be electrocuted during the week beginning April 10, 1916. A respite however was granted by the Governor on March 22, 1916, until the week beginning June 12, 1916, for the purpose of presenting an application to the Court for a new trial on the ground of newly discovered evidence. An extension of respite was granted on May 31, 1916, until the week beginning July 10, 1916, on the motion for a new trial before Mr. Justice Manning, which motion was denied.

Mr. Justice Manning writes as follows:

“Upon the argument for a new trial there was presented to me certain evidence as to the man's good character and testimony as to the bad and quarrelsome character of the man he shot and also certain other evidence not presented upon the trial, which if not in itself sufficient to warrant me in granting the new trial, is, however, of sufficient gravity and importance to justify me in stating to you that in my opinion the case is one wherein you would be justified in extending to the condemned man such executive clemency as you deem proper.

I may add to this letter that I have consulted with the district attorney who prosecuted the case and who opposed the motion for a new trial and he has approved of the action which I take in sending you this letter and will join in the recommendation for executive clemency.”

From the evidence presented, it would seem as though the story told by the defendant that he acted in self-defense was substantiating.

In view of the recommendation of the judge, which is concurred in by the district attorney, and of others who have made

a careful study of this case, I am satisfied that the ends of justice will be more substantially conserved by a commutation of sentence to life imprisonment.

July 12. Moses Gutman. Sentenced January 20, 1914; county, New York; crime, forgery, second degree; term, four years six months, minimum, nine years six months, maximum; Great Meadow Prison.

Commutated to two years, five months, eight days, minimum, nine years six months, maximum.

This commutation of sentence is recommended by District Attorney Swann and by Judge Mulqueen.

The report of the district attorney is under date of April 12, 1916, and states that the prisoner has rendered valuable service to the State in the prosecution of Hyman Fish, and closes his recommendation by saying, "I recommend that his sentence be commuted so that his term of imprisonment will end at once." Judge Mulqueen who presided at the trial endorses the recommendation of the district attorney for clemency and also recommends that Gutman be released at once.

In view of the above recommendations I have commuted the sentence so that Gutman may be released by the Parole Board.

July 18. Robert O'Brien. Sentenced December 12, 1912; county of Livingston; crime, grand larceny and burglary, second degree; term, five years six months, minimum, six years six months, maximum; Auburn Prison.

Commutated to three years, seven months, six days.

This commutation of sentence is recommended by the district attorney of Livingston county who prosecuted the case. In his report to the Governor the district attorney makes the following recommendation:

"O'Brien was jointly indicted with one O'Connell for breaking into a hotel at Portage, N. Y., and stealing some money, whiskey and a few cigars. The money was found in a nearby woods, as well as the other property excepting what had been consumed and all returned to the owner.

"O'Brien was employed by the Erie Railroad Co., and lived in a nearby shanty belonging to the company.

"None of the witnesses produced by the people saw the

crime committed and O'Connell pleaded guilty, and about the only evidence connecting O'Brien with the commission of the crime was an alleged confession made to Deputy Sheriff O'Leary.

"It appeared that O'Connell had been hanging about Portage for some time prior to the commission of the crime and frequently went to the O'Brien shack and on the night when the crime was committed brought there three or four quarts of whiskey, and that they both drank some of it, and then after a time O'Brien ejected O'Connell from the shack and went to bed; that at this time O'Connell had in his possession some money and O'Brien asked him where he got the whiskey and money and he said that he took it from the hotel, and then according to O'Brien's story he put him out, and O'Connell went into the woods and hid the money and was caught there the next day by the officers with the whiskey and also turned over the money which he previously concealed.

"On the day following O'Brien went to work as was usual with him and was arrested while at work, and it developed as a part of the defendant's case that he made his alleged confession to Officer O'Leary after he was handcuffed, and given a quantity of whiskey.

"The case was submitted to the jury by Judge Carter upon the grounds that O'Brien was the man who laid the plans and that O'Connell did the job.

"I am informed that it was shown upon the trial that the defendant had never before been convicted of any crime.

"And that O'Connell testified upon the trial that he committed the crime and that O'Brien had nothing to do with it.

"It seems to be the general notion prevailing with the sheriff's force and with others who heard the trial that this defendant has been sufficiently punished and that it is a proper case for the exercise of executive clemency."

Since the conviction of O'Brien, Judge Carter who tried the case has died.

July 21. Max Swersky. Sentenced January 21, 1914;

county, New York; crime, violation of section 190 of the Penal Law; term, one year nine months, minimum, three years eight months, maximum; Sing Sing Prison.

Commuted to six months, thirteen days, minimum, three years, eight months, maximum.

This commutation of sentence is approved by Dr. Magnes, chairman of the Kehillah; former Warden Kirchwey of Sing Sing Prison; Commissioner Joseph Barondes; ex-Deputy Police Commissioner Newburgher and Dr. S. Buechler, the Jewish chaplain in Sing Sing Prison.

Commissioners Newburgher and Barondes have agreed to care for Swersky if he is paroled.

August 2. Eugene Dumas. Sentenced June 14, 1912; county, New York; crime, grand larceny, second degree, two charges; terms, four years and three years eleven months which equals seven years eleven months; Sing Sing Prison.

Commuted to four years, one month, eight days, minimum, seven years eleven months, maximum.

Dumas is now suffering from an advanced case of cancer of the tongue, and Dr. William Seaman Bainbridge who operated upon him on June 26, 1916, says that he has but a short time to live.

The report from the district attorney says, "I am informed that the first term of imprisonment imposed upon the prisoner has already expired and that he is now serving the second sentence imposed. It is further stated to me that the prisoner is in delicate health and if, in your judgment, the time already served by him is sufficient expiation for his crimes, I know of no reason why a commutation of his sentence should not be granted." Upon the report of the district attorney and the information of the physician, I have commuted his sentence.

August 7. Onne Talas. Sentenced November, 1915; county, New York; crime, murder, first degree; to be executed; Sing Sing Prison.

Commuted to life imprisonment.

This commutation is recommended by the judges of the Court of Appeals who affirmed the judgment of conviction on appeal. Talas was convicted of murder in the first degree on the theory

that he was a party to the commission of the crime, namely the robbing of his employer, Mrs. Nichols, which resulted in the killing of the latter.

Talas was a servant in the household of Mrs. Nichols and one Arthur Waldenen suggested to him that some night he would come to the house when other servants were out and if Talas would let him he would rob Mrs. Nichols and divide the proceeds of the crime. Waldenen had been a servant in the Nichols household prior to the time that Talas was employed there, and was instrumental in obtaining Talas his position. On the night of the commission of the crime Waldenen appeared with two men known as Eddie and the "Wop." Talas let them in the basement door and they tied his hands and left him. They then proceeded upstairs where they strangled to death Mrs. Nichols and robbed her of her jewelry.

Prior to the time of his trial Talas made a confession substantially admitting the story as heretofore set forth.

Section 1044 of the Penal Law provides as follows:

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; *or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise.*

Under our statutes burglary and robbery are felonies.

A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal.

So, where several persons combine together for the purpose of committing a burglary or robbery, and death results to a third person from the act of one of them in carrying out the common design, they are all criminally responsible as principals.

At the time of the trial the jury, after deliberating for nearly four hours, returned to the court and stated "Your Honor, it is respectfully requested by this jury that they be advised if it is not in some way possible to render a verdict in lesser degree than murder in the first degree." The court thereupon instructed the jury that the form of the verdict should be either not guilty or guilty of murder in the first degree, which is, of course, in accordance with the law. Thereupon the jury, after further deliberation, found the defendant guilty of murder in the first degree.

Talas, a boy of 22 years of age, was born in Finland, he came to this country when he was about 17 years of age. His record up to the time of his conviction had been good, and his participation in the crime was probably due to his youth and ignorance of the probable consequences, both to Mrs. Nichols and himself. None of the other persons implicated in the murder have been apprehended.

I have been advised that all of the members of the Court of Appeals are of the opinion that under all of the circumstances, the case is one where I might very well exercise the power of commutation of the death sentence and one of the judges was authorized by the members of the court to express this opinion to me.

In view of the summary of the case as above set forth, and the recommendations of the judges of the Court of Appeals, I have determined that this is a proper case for the exercise of executive clemency and have acted accordingly.

August 15. Ralph Dubocq. Sentenced March 30, 1914; county Kings; crime, grand larceny, second degree; term, two years six months, minimum; four years six months, maximum; Sing Sing Prison.

Commutated to two years, four months, fourteen days.

I have received a certificate from Dr. John E. Wade, a physician residing in Brooklyn, who states that he is attending the prisoner's wife, that she is in a serious condition and that, in his opinion, she cannot live more than two or three days.

The district attorney has recommended that the commutation be granted.

August 25. William Wilson. Sentenced February 26, 1912; county, New York; crime, grand larceny, first degree; term, ten years; Great Meadow Prison.

Commuted to three years, seven months, nineteen days, minimum, ten years, maximum.

This commutation is recommended by District Attorney Swann, of New York county who writes that Wilson has rendered valuable service in giving information to the district attorney's office, which was of material assistance in other criminal prosecutions.

The district attorney states:

"I believe the ends of justice would be conserved by commuting the sentence of the said William Wilson to the time actually spent in jail and placing him under the jurisdiction of the State Board of Parole for the balance of his term."

Judge O'Sullivan, at the time of imposing sentence, said that he had no discretion in the matter, but under the statute was compelled to impose a straight ten year term. He intimated at the time of the sentence, however, that at a later date, Wilson's case should receive consideration.

September 12. David Kassowitz. Sentenced April 22, 1915; county, New York; crime, burglary, third degree; term, two years six months; Auburn Prison.

Commuted to one year, four months, eighteen days, minimum; two years six months, maximum.

Judge Wadhams before whom the prisoner was convicted has recommended clemency in his behalf and states in his communication that in view of the services Kassowitz has rendered to the State in testifying in other cases he believes that clemency should be exercised in his behalf.

The district attorney in his communication relative to the case, after stating the facts in connection therewith says that Kassowitz rendered services to the people which were of considerable value.

In view of the communications of Judge Wadhams and the district attorney, I have determined to commute the sentence so that Kassowitz may appear before the Parole Board and be released.

September 12. Adolf Mandel. Sentenced May 4, 1915; county, New York; crime, violating section 295 of the Penal Law; term, two years six months, minimum; five years, maximum, and to pay a fine of three thousand dollars; Sing Sing Prison.

Commuted to one year, four months and two days.

Mandel was a private banker and was convicted of receiving deposits when his bank was in an insolvent condition. He has been substantially punished, having served on September 11th, sixteen months of his minimum term. Under the amended Prison Law of 1916, his minimum term would expire on June 30, 1917, and he would then be eligible to be released by the Parole Board.

I have given several hearings on this matter and on the 9th of September a final hearing was had at which time it was represented by the applicants for clemency in behalf of Mandel that all of the large depositors in his bank were in favor of clemency being extended to him on the ground that ever since his imprisonment he has aided in every way in his power to straighten out the affairs of the bank and has been of valuable assistance to the depositors thereof. His wife has released all of her dower interests in his property, so that the same might be turned over for the benefit of the depositors.

In view of the unanimity of the depositors in this matter and being satisfied of Mandel's efforts to make restitution, so far as lies in his power, I have determined that it is a proper case for the exercise of clemency and have commuted his sentence.

September 16. Alfred Schwitofsky. Sentenced June 5, 1911; county, New York; crime, burglary, second degree, and assault, first degree; term, twenty years; Sing Sing Prison.

Commuted to five years, three months, two days.

The defendant was arrested in January, 1911, charged with the burglary of the house of one Dale. The arrest occurred about ten days after the crime was committed. The police officers were told by an accomplice in the crime who the defendant was and where he could be found, and he was thereupon imprisoned, was indicted as a second offender, tried and convicted and sentenced to twenty years in State Prison at Ossining, N. Y.

The conviction was unanimously affirmed by the Appellate Division after a motion for a new trial was denied by the trial judge.

The defendant has a long criminal history; was convicted twice of larceny in New Jersey, once of larceny in Pennsylvania and he

pleaded guilty of burglary in New York prior to the crime for which he now suffers imprisonment. He has been known by the aliases of Welz, Walz and Gerber.

After his committal to State Prison the persons interested in his case asserted his innocence of the crime and procured the appointment by Governor Glynn of the members of the Parole Board as a Commission to inquire into the defendant's crime. The report of the Parole Board was submitted to Governor Glynn under date of October 19, 1914, and they made the following recommendation:

"The prisoner has served a term of imprisonment since June 5, 1911. This imprisonment appears to have been sufficient to entitle him to the benefit of a parole, so that if during his period of qualified liberty he may by good conduct earn an absolute discharge."

There was no claim in the report of the Parole Board of the innocence of Schwitofsky. This report was before Governor Glynn from October 19, 1914, until December 31, 1914, and he declined to release the prisoner.

Under date of March 31, 1915, I submitted to the Parole Board the following questions for their specific findings:

- (1) Was Alfred V. Schwitofsky in the house of Theodore B. Dale on the date alleged in the indictment?
- (2) Was he armed with a pistol when he entered the house?
- (3) Is he the same person who was seen by and identified by the employees of Dale, and by Harold Rivers and Bruen, the chauffeurs?

All of the questions submitted were answered in the affirmative and the questions and answers as given by the Board are as follows:

Question 1. Was Alfred V. Schwitofsky in the house of Theodore B. Dale on the date alleged in the indictment?

Answer: Yes.

Question 2. Was he armed with a pistol when he entered the house?

Answer: He was armed with a pistol when he entered the house, but that such pistol was loaded with blank cartridges.

Question 3. Is he the same person who was seen by and identified by the employees of Dale, and by Harold, Rivers and Bruen, the chauffeurs?

Answer: Yes.

This establishes beyond a question that Schwitofsky was guilty of the crimes charged.

There is no doubt of the defendant's guilt, nor that his attempt of two years ago to procure his discharge on a claim of innocence was fraudulent. Now, however, application is made for executive clemency based upon the defendant's physical and mental condition. His history shows him to have been once committed to the Matteawan Asylum for the criminal insane. He is now alleged to be showing symptoms of mental disturbance.

Judge O'Sullivan in his report to Governor Dix in 1912, concluded as follows:

"As you will recall the double conviction was of second offenses. The law in that case imposes a minimum below which the court cannot go, and in this case the minimum was ten years on each offense; whether the court was or was not disposed to impose a lighter sentence there was no legal possibility of doing so.

"It is not at all improbable that I would have imposed a lighter sentence had it been in my power to do so. I do not believe that suspension of sentence for either offense was within the domain of justice or legal propriety. However, if at a later date executive clemency shall be inclined to do that which the court had no power to do, namely to reduce the term of the defendant's imprisonment, I do not believe that justice shall suffer."

In a report from the district attorney of New York county under date of December 31, 1913, to Governor Glynn, the district attorney (now governor) stated as follows:

"Before Judge O'Sullivan's death I consulted him respecting this case and it was his desire that when a proper

period had elapsed the sentence of the prisoner be commuted to ten years. Judge O'Sullivan stated to me that he had imposed the shortest sentence possible under the law and that had he the power he would have sentenced the prisoner to a term not in excess of ten years. Because of Judge O'Sullivan's recommendation to me, and because of the further investigations which show that as to the assault conviction the degree of that crime for which he was sentenced was not fully established. I believe that the prisoner's sentence might properly be commuted to the term of ten years, which was the term imposed upon him under the conviction of burglary in the second degree."

In view of the recommendation of Judge O'Sullivan and the report of the district attorney as above set forth that the sentence be reduced to ten years, under which the prisoner would be compelled to serve six years and six months, and the fact that he has served a period of five years three months and two days, and in view of the entire case and the fact that Schwitofsky has now suffered a substantial term of imprisonment, and charitably disposed persons have agreed to care for him in the future, I have commuted his sentence.

September 27. Frank J. Walrath. Sentenced February 22, 1912; county, Rensselaer; crime, attempted arson, first degree; term, five years, minimum, seven years two months, maximum: Great Meadow Prison.

Commutated to four years, seven months, six days.

This commutation of sentence was granted upon the recommendation of the judge who presided at the trial and the district attorney who prosecuted the case.

The district attorney in his communication to me under date of January 14, 1916, states:

"This was his first conviction and he has served practically four years. I believe the cause of justice will be fully subserved if a pardon be granted to him, and I heartily recommend the same."

The judge in his report under date of November 9, 1915, states that the attempt to commit the offense was not made in a vicious

way, but rather, with the abandon of a careless, indifferent boy. There had previously been fires and attempts at fires in the vicinity, and sentiment ran high against Walrath when it was shown that he had committed the crime to which he pled guilty but so far as the judge could remember there was no evidence of any kind tracing the other attempts to Walrath.

The judge says that he has made a careful examination of the sentiment of the community, and is satisfied that no mistake will be made if clemency be granted.

In view of the above recommendations I have commuted the sentence.

September 28. Charles Alderwick. Sentenced November 17, 1913; county, Oneida; crime, rape, first degree; term, five years, minimum, eight years six months, maximum; Auburn Prison.

Commuted to two years seven months sixteen days.

The district attorney who prosecuted the case under date of September 13, states as follows:

“I am informed that this young man has been a model prisoner at Auburn, and I felt at the time that his sentence was rather severe, and while I think the transaction merited a severe punishment, if there is any good left in Mr. Alderwick it would seem that he might be given an opportunity now to demonstrate it.”

The judge who presided at the trial, after stating the facts in the case, says:

“As to whether the question of executive clemency should be allowed, after mature deliberation, I am quite inclined to favor it. I am informed by the warden of the prison that since he has been there Alderwick has been a model prisoner, and I think that is ground for hope that he has been taught a severe lesson and that he may behave himself hereafter.”

Numerous citizens of the city of Utica where the transaction occurred have written in his behalf, and in view of the fact that the prisoner has already been severely punished, and the numerous recommendations asking for his release, I have commuted his sentence accordingly.

September 28. Harold Rich. Sentenced May 20, 1914; county of Bronx; crime, forgery, second degree; term, seven years six months; Sing Sing Prison.

Commuted to two years, three months, twenty-eight days.

Judge Gibbs who presided at the trial, in a communication under date of June 9, 1916, states that he has seen Rich at the prison and is satisfied that since his confinement he has reformed, and says that he has concluded that the application for executive clemency is well merited, and he begs that the governor approve the application.

The district attorney who prosecuted the case in two communications, one under date of May 26, 1916, and one under date of September 25, 1916, does not oppose clemency. Numerous people are interested in Rich and that employment has been secured for him by those interested in him and he will be properly taken care of if released.

September 30. Morris Friedman. Sentenced July 26, 1915; county, Kings; crime, criminally receiving stolen goods, second offense; term, five years one month; Auburn Prison.

Commuted to ten months.

Friedman was originally convicted in Kings county and sentenced in June, 1915, to one year in the penitentiary. After serving a portion of his sentence he was brought to court on a writ of habeas corpus and re-sentenced to five years and one month. Friedman has already served under both sentences one year and three months on September 29.

The judge who presided at the trial of Friedman states in his communication that he thought the man ought not to have received a greater sentence than one year.

In view of the judge's recommendation, and the fact that Friedman has now served fifteen months, I have commuted his sentence accordingly.

October 6. Charles A. Clary. Sentenced March 22, 1916; county of Ontario; crime, perjury; term, one year six months, minimum; two years six months, maximum; Great Meadow Prison.

Commuted to six months, ten days.

Both the judge and district attorney in this case have advised

me that they think the man has been sufficiently punished and should be released. Supreme Court Justice Benton who had the matter before him in a civil way advises me that there is no question of the man's guilt but that the ends of justice have been served, and he recommends Clary's release.

In view of the recommendations of Judges Benton and Baker and also the district attorney, I have accordingly commuted the sentence.

December 4. Charles Frederick Stielow. Sentenced July, 1915; county, Orleans; crime, murder, first degree; to be executed; Sing Sing Prison.

Commuted to life imprisonment.

No other criminal case, where clemency has been asked, has perplexed and distressed me as has this.

The crime of which defendant has been convicted, is one of the most atrocious in the history of the State.

Two burglars murdered an unarmed man in his home in the dead of night and added to the hideousness of their offense the murder of a defenseless woman fleeing for her life.

The intense feeling against the perpetrators of the crime in the community where it was committed is natural and is justified.

I realize that a governor, who interferes with a judgment of the courts of this State, without a good and sufficient cause, is himself committing a lawless act.

I believe that Stielow is guilty. Perhaps never in the history of New York has a man been afforded greater opportunity to establish his innocence if that be possible. Twelve jurors and ten judges have passed upon this case without one dissenting opinion indicated or expressed. The situation, however, so far as I am able to learn, is unprecedented.

Another man, under the sanctity of an oath, with all the solemnity possible under the conditions, has confessed that he and not Stielow committed the crime. There is considerable of detail and circumstance in the King confession and in the facts surrounding it as yet unexplained and to me unaccountable. To be sure, the King confession has been repudiated and so has the Stielow confession, without which Stielow could not have been convicted. I believe that King's confession is a lie.

I can not escape the conviction, however, in the light of all that

has been presented to me and which was not before me when I denied the last application for clemency after I had granted three reprieves, that there is a possibility, perhaps more than a possibility, that this defendant is not guilty.

I think I am doing right in commuting his sentence to imprisonment for life.

The procedure in the courts has been correct. The action of the judges on motions for a new trial has been absolutely right.

The King confession, uncorroborated and repudiated by himself, could not be introduced under our rules of evidence, as has been very clearly set forth by Justice Rodenbeck, but I believe, and I speak from years of experience in the trial of criminal cases, that no jury in this country would have convicted Stielow of murder in the first degree with the King confession before it.

I commute the sentence of the court to imprisonment for life.

December 5. Selig Levine. County of New York: crime, burglary, first degree; term, twenty years, minimum, life maximum. Sentenced May 27, 1910; Clinton Prison.

Commuted to six years, six months, twenty-two days, minimum, life maximum.

This commutation of sentence is recommended by Judge Malone who presided at the trial of Levine and by myself when district attorney.

Judge Malone in his communication states as follows:

“I informed counsel for Levine some considerable time after the date of sentence that at the expiration of five years, if his prison record was good and application was made to the governor, I would say to him that in my opinion sufficient punishment had been suffered by Levine to meet the ends of justice, and that his case was a proper case, in my judgment, for the exercise of executive clemency. That period has not been reached and I take pleasure in conveying to you my favorable attitude in the premises, in view of the application which is in your hands.”

Judge Malone's report is under date of October 14, 1915, so that Levine has served over an additional year since that recommendation.

The district attorney of New York county (now governor), under date of October 6, 1914, in a communication to the governor stated that he concurred in the recommendation of Judge Malone.

December 6. Anselmo Perrotta. Sentenced December 7, 1906; county, Monroe; crime, murder, second degree; term, life; Auburn Prison.

Commutated to ten years, minimum, life, maximum.

Since Perrotta was sentenced the law has been changed, and the punishment under such changed law for murder, second degree is imprisonment to a minimum term of twenty years and a maximum term of life.

The commutation of sentence is granted upon the recommendation of the judge who presided at the trial and the district attorney who prosecuted the case. In their recommendations they state to the governor that in their judgment the man has been sufficiently punished by serving ten years for the crime.

Perrotta at the time of his conviction could not understand a word of English, and most of the witnesses in the case who were Italians were in the same position.

The prisoner has always maintained that he defended himself against an attack, and if he had not done so he would have been killed.

In view of his perfect record in prison, and the fact that he has served ten years, and acting upon the recommendation of the judge who presided at the trial and the district attorney, I have concluded that it was a proper case for the commutation of the sentence to a minimum term of ten years and a maximum term of life, so that the Parole Board might, if they were satisfied, release this man under parole.

December 12. Joseph Toblinsky. Sentenced March 24, 1913; county, New York; crime, grand larceny, second degree and burglary, third degree; term, ten years; Sing Sing Prison.

Commutated to three years, one month, fourteen days, minimum, ten years, maximum.

This commutation of sentence is recommended by the district attorney of New York county who wrote under date of November 12, 1915, that the prisoner had rendered valuable aid in testifying

in other cases, and the information which he gave led in some instances to indictments. The district attorney in his communication states that the information furnished to his office by Toblinsky was accurate and valuable, and the results of his disclosures have been far-reaching in their effect, and he further recommended at the time of making his report that the sentence be commuted so that the prisoner might be placed under the jurisdiction of the Parole Board. Since the receipt of that communication a year has elapsed, and in view of the recommendation of the district attorney I have commuted the sentence.

December 20. Anna Michael. Sentenced November 24, 1914; county, New York; crime, grand larceny, first degree; term, five years, minimum, nine years six months, maximum; Auburn Prison.

Committed to two years, one month, minimum, nine years, six months, maximum.

This commutation is granted upon the recommendation of Judge Mulqueen who presided at the trial, who writes as follows:

“I beg to state to your excellency, that I feel convinced that I was too severe in this case. I am convinced that she was not so bad as I then thought. I regret that I did not make the minimum sentence one year. From my re-investigation I have no doubt that if you will reduce the minimum sentence, so that she may be paroled, Miss Pierce and other charitable and excellent people will lead her to live an honest and good life. I trust that you will rectify my mistake and see that she is set free.”

December 23. Thomas Piptone. Sentenced September 9, 1914; county of New York; crime, grand larceny, first degree; term, three years, minimum, six years, maximum; Great Meadow Prison.

Committed to two years, four months, minimum, six years, maximum.

This commutation is granted upon the recommendation of Judge Nott, who writes under date of November 17, 1916, as follows:

“On the 3rd day of May, 1916. I wrote you in reply to an executive communication, the case of Thomas Piptone.

recommending that he should serve the minimum term of the sentence imposed.

“ Since then it has been brought to my attention that the prisoner is now suffering from an open and running wound in the abdomen which very seriously endangers his life. For this reason I am of the opinion that the ends of justice will have been subserved if he were now to receive commutation of sentence. He has served over two years out of the three years imposed as a minimum.


In view of the above recommendation, I have granted the commutation of sentence.

December 23. Chester Allen. Sentenced April 19, 1915; county of Jefferson; crime, burglary, third degree; second offense; term, five years eight months; Auburn Prison.

Commutated to one year, eight months, eight days, minimum, five years, eight months, maximum.

This commutation is granted upon the recommendations of the judge and district attorney of Jefferson county, who under date of May 1, 1916, write as follows:

“ Allen was sentenced on a charge of burglary in the third degree, after a prior conviction of a felony. He is a man with a family and has always taken good care of his family. He has never got in trouble or committed any crime except when under the influence of liquor. The crime for which he was sentenced was not a serious one, but, as he had previously been convicted, the County Court was compelled under the statutes, to impose the maximum punishment of five years. This punishment, in our judgment, is unreasonable and both the court and the district attorney told Allen at the time of the sentence that if his conduct in prison was good, would join in a request for his pardon at the end of a year. The year has expired. We are informed that his conduct has been exemplary and letters received from him during the year indicate a firm and decided purpose to abstain from drink. We think it would be not only wrong but liable to make a confirmed criminal of Allen should he be required to serve longer.”



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1917

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1917

STATE OF NEW YORK

STATEMENT

OF

**Pardons, Commutations and
Reprieves Granted by
the Governor
1916**

TRANSMITTED TO THE LEGISLATURE APRIL 4, 1917

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APRIL 4, 1917

Statement of Pardons, Commutations and Reprieves Granted by the Governor in 1916

STATE OF NEW YORK

EXECUTIVE CHAMBER

ALBANY, *April* 4, 1917.

To the Legislature:

I have the honor to transmit herewith a statement of the pardons, commutations and reprieves granted by me during the year 1916.

CHARLES S. WHITMAN.

PARDONS, COMMUTATIONS AND REPRIEVES

PARDONS

April 20. Francisco Marino. Sentenced March 3, 1916; county, New York; crime, practicing medicine without a license; term, sixty days; New York Penitentiary.

This pardon was granted upon the recommendation of Judges O'Keefe, McInerney and Garvin, composing the Court of Special Sessions; and a petition of over five hundred citizens requesting that the man be released.

August 25. Richard Roe, whose right name is Dudley Rogers. Sentenced November 2, 1899; county, Oneida; crime murder second degree; term, life; Clinton Prison.

Roe is over seventy years of age and has served over seventeen years in prison.

It appears from the record that Roe and two others committed a burglary near Utica, in 1898, taking about \$122.00 in money. Shortly after the burglary, they attempted to take a horse and cutter from a barn, when they were seen by a woman in a house nearby, who notified the hired man. This hired man, named John Mooney, levelled a gun at them. A shot was fired by Sullivan, alias John Doe, who was with Richard Roe, which caused the death of Mooney.

John Doe was caught soon thereafter and in May, 1899, was tried before the Honorable Pardon C. Williams. He was convicted of murder in the second degree and sentenced to life imprisonment and died during 1914 at Clinton Prison.

Five months after the conviction of Sullivan, alias John Doe, the prisoner, known as Richard Roe, was convicted and sentenced to life imprisonment.

The Honorable Timothy Curtin, the district attorney of Oneida county, at the time Roe was convicted said:

“ I was District Attorney of Oneida county at the time of the conviction of Dudley Rogers (alias Richard Roe) and John Doe, otherwise known as “ Con ” Sullivan for the

shooting of a farm-hand in the town of Paris, in this county. There was one shot fired and at the time of the trial, it was not known which of the two fired the shot. Neither of them testified as a witness on the trial. I have learned since the trial, upon reliable authority, that it was Sullivan who fired the shot. The theory upon which both of the defendants, John Doe and Richard Roe were convicted, there being but one shot fired, was that they were engaged in the commission of a felony immediately prior to, or at the time of the shooting.

I believe that Mr. Rogers (alias Richard Roe) has been punished sufficiently, and I assume that he must be a very old man. It is my belief that the Pardoning Board will not make a mistake if they should grant him a pardon."

In view of the recommendations of the district attorney who prosecuted the man at the time of his trial, I have determined that it was a proper case for the exercising of clemency and have accordingly issued a pardon.

September 5. Robert G. Kelsey. Sentenced April 3, 1914; county, Kings; crime, grand larceny, 1st degree; term, two years six months, minimum, five years, maximum; Sing Sing Prison.

Kelsey's minimum term would expire on October 1, 1916, and he has only twenty-five more days to serve.

The judge before whom Kelsey was tried has recommended executive clemency. Kelsey's conduct in prison has been good. He has an aunt who has stood by him through all of his trouble and who is now dangerously ill. In view of the recommendation of the judge, together with his prison conduct and his aunt's illness, and of the few days which he has yet to serve on his minimum term, I have determined that it is a proper case for the exercise of clemency and have therefore issued a pardon.

November 29. Mary Jennings. Sentenced October 21, 1901; county, New York; crime, murder second degree; term, twenty years, minimum, life, maximum; Auburn Prison.

I have been advised by persons interested in this case that if she were liberated that they would look after her.

The crime for which she was convicted grew out of a dispute with another woman who was working in Child's restaurant.

During the dispute Mary Jennings stabbed one Katy McVeight with a knife, from which she subsequently died.

There has always been a question as to whether Mary Jennings should not have been convicted of manslaughter instead of murder, and in view of the doubt in the matter, and she having served a much longer period than she would have served had she been convicted of manslaughter, I have accordingly pardoned her.

December 21. William J. Cummins. Sentenced November 24, 1911; county, New York; crime, grand larceny, first degree; term, four years eight months, minimum, eight years eight months, maximum: Great Meadow Prison.

I have decided to grant the application of William J. Cummins for a pardon. Inasmuch as Mr. Cummins was convicted under my prosecution while I was district attorney of New York county, I deem it proper to state my reasons for granting this pardon.

I have never had any doubt of the guilt of Cummins, and it might well be, under ordinary circumstances, that an Executive with such a view would content himself with allowing the sentence imposed to be served in full. However, I am not unmindful of the reasons why the pardoning power has been granted to the executive, and accordingly I have given great care to the examination of Cummins' petition and the recommendations of those who support it, to the end that I might so far as possible impartially performed my duty aside from my former association with the case.

He was convicted of having illegally applied moneys to his own use in connection with the operations of himself and his friends in control of the Carnegie Trust Company, the Van Norden Trust Company and the Nineteenth Ward Bank of the city of New York. For this offense he was sentenced to a term of four years and eight months, and he has now spent in jail and in the State's Prison about three years and two months. Letters and petitions asking his pardon have been presented by people from almost every state in the Union. Virtually the great State of Tennessee has as one man asked for Mr. Cummins' pardon, for I find among the petitioners its Governor and ex-Governors, all of its State officials, its United States Senators, all of its Congressmen, practically all of its leading merchants, manufacturers, bankers, and

many of its judges. I find the Senators of several other states, among them the Hon. Oscar W. Underwood and F. P. Glass. I find the Governors of Arkansas, Alabama and Missouri. There are also among the petitioners representatives of the largest manufacturing and business interests of the United States. In his early life Cummins represented some of the largest of these houses in the south, and they all speak highly of him. Lawyers of the city of New York and all parts of the United States, as well as judges of the United States Courts, cabinet officers, congressmen and other officials of many states, and the clergy of various sects, speak in the highest terms of Mr. Cummins as a man. Nearly all of these people have been associated with him either socially or in business. Delegation after delegation has come from all parts of the United States to ask his pardon.

I mention all of these things not because they are controlling with me but because I believe, that even though a man has done wrong, as I believe Mr. Cummins did, the fact that in his entire business life outside of the situation which resulted in his downfall he has conducted himself in such a way as to command the respect and support of his associates, should have great weight. His offense was a serious one, but he has been severely punished. Almost any term of imprisonment for a man of his standing would have been a woeful punishment and a warning to others. Cummins was not a banker, and his inexperience may, in a measure, mitigate his offense, but it would never do to excuse men who misuse the funds of banks simply on account of their ignorance.

The man who suffered the greatest personal loss from the failure of the Carnegie Trust Company was Mr. Andrew Carnegie, who lost in the neighborhood of two million dollars.

Mr. Andrew Carnegie under date of March 12, 1914, communicated with me in reference to the case, and in his communication he states:

“I have never asked a Governor to pardon anyone and I do not ask you do so. On the other hand, I feel that it is due to Mr. Cummins to say that I do not believe he knowingly broke the law. He had no experience in banking, and as the facts showed, Mr. Clark Williams, head of the State Banking Department, had agreed to take the Presidency of a union of

three banks, one of which was the Carnegie Trust Company. The published evidence shows that I made the Trust Company a loan of \$2,000,000 5 per cent bonds on the statement of Mr. Williams that I would be doing a public service. I felt sure that if so able and trust-worthy a man as Mr. Williams were at the head of the proposed consolidation he would not fail to make it a success. Unfortunately, the scheme did not mature.

“ Mr. Cummins has many friends and he is very popular wherever known, and I believe he broke the laws unknowingly if at all. He is a kind husband and father and has a family around him which are the best, and he has hosts of friends, many of whom came to see me from the South. He stands well among his neighbors.”

The principal representative of the institutions other than the Carnegie Trust Company which were involved in the whole affair was Mr. Bradley Martin, President of the Nineteenth Ward Bank and Vice President of the Van Norden Trust Company. It was upon his testimony principally that Mr. Cummins was convicted. Mr. Martin has also joined in the application, as have many other directors and persons who suffered loss. Ten of the trial jurors who convicted Mr. Cummins have also united in the petition.

Mr. Justice Davis who presided at the trial of Mr. Cummins, under date of December 13, 1916, writes me as follows:

“ In answer to your letter referring to the application of William Cummins for executive clemency, I beg to state that I have no objection to the granting of the application.

“ I think Cummins has served about thirty-eight months of his term. If I am right on this point, it would seem that the ends of justice had been served in Cummins' case.

In fact, I think that the testimonials, which have been presented, have never been equalled in number or fervor on behalf of a man in prison petitioning for pardon in this State.

In considering this application, the executive must regard the opinions and feelings of those men whose good faith cannot be questioned, and it is my opinion, and this is shared by the distin-

guished judge who presided over the trial, with whom I have consulted, that the interests of justice will be served by granting the application.

Another thing which has had great weight with me is Mr. Cummins' conduct since the failure of the Carnegie Trust Company. He and his family have given up everything they had, and he has energetically devoted himself, both while in prison and before confinement, to the assistance of the Banking Department in collecting assets of the defunct institution.

December 22. Alfred F. Market. Sentenced March 23, 1916; county, Onondaga; crime, forgery, second degree; term, one year, minimum, one year two months, maximum; Clinton Prison.

Market's minimum term of one year has practically expired and he has been paroled by the Parole Board to leave prison on January 4, 1917.

In view of this fact I have determined that the ends of justice will be substantially met by granting a pardon in this case.

December 22. Frank G. Todaro. Sentenced December 8, 1914; county, Oneida; crime, blackmail; term, five years, minimum, nine years six months, maximum; Great Meadow Prison.

This pardon is granted upon the recommendation of Judge Hazard who writes as follows:

"I am frank to say that if the case were left with me to decide, and if I were to give the doctrine of reasonable doubt any application at all, that I do not believe I should have convicted Todaro.

"I do not know as I can say more, and if you feel that it is a proper case to give the defendant the benefit of a doubt, I have already indicated that in my opinion he may be entitled to it."

This report is under date of October 26, 1916.

In view of the attitude of Judge Hazard in this case and the fact that this man has served over two years on his minimum sentence, I have determined that it is a proper case for the exercise of executive clemency and have accordingly issued this pardon.

COMMUTATIONS

January 6. William Keenan. Sentenced January 26, 1903; county, Kings; crime, burglary, first degree; term, twenty-seven years; Clinton Prison.

Commuted to twelve years, eleven months, ten days, minimum, twenty-seven years maximum.

Robert A. Ray. Sentenced January 26, 1903; county, Kings; crime, burglary, first degree; term, twenty-seven years; Clinton Prison.

Commuted to twelve years, eleven months, ten days, minimum, twenty-seven years, maximum.

Keenan and Ray were convicted in Kings county of burglary first degree, and sentenced by Judge Crane on January 26, 1903, to Sing Sing Prison for a term of twenty-seven years.

The commutations of sentence in both cases are recommended by Judge Crane, who writes to a former Governor under date of June 25, 1914, as follows:

“In my opinion these men have served a long time and are now much older and probably much wiser and it would be a proper thing to give them some encouragement to decent living if their sentence could be so commuted that for a while after they were released from prison they would be under the surveillance of the Board of Parole.”

Judge Crane has also made practically the same recommendation in a report under date of September 20, 1915.

The district attorney of Kings county on May 15, 1914, recommended that the sentences of Keenan and Ray be commuted so that they might be released by the Board of Parole.

In view of the above recommendations, and upon the assurance of Major Thomas Cowan of the Salvation Army that these men would be furnished employment, upon their release, I have commuted their sentences.

January 25. Charles L. Dubelier. Sentenced March 27, 1914; county, New York; crime, bribery; term, two years eight months, minimum, four years six months, maximum; Sing Sing Prison.

Commutated to one year, nine months, twenty-three days, minimum, four years six months, maximum.

This commutation is granted upon the recommendation of Judge Davis and District Attorney Perkins.

District Attorney Perkins in his report states as follows:

“I am informed that Dubelier's conduct in prison has been good and I believe, if it meets with your approval, that the interests of justice will be conserved by a commutation of the sentence heretofore imposed to equal the time that the prisoner, Charles Dubelier, has already spent in prison, and that he be placed under the jurisdiction of the State Board of Parole.”

The judge concurs in the above recommendation.

February 3. Charles Solomon. Sentenced January 17, 1913; county, New York; crime, attempted bribery; term, two years, minimum, four years six months, maximum; Sing Sing Prison.

Commutated to one year, six months, three days, minimum, four years, six months, maximum.

Solomon's minimum term would expire on July 29, 1916, when he would then be eligible for parole.

The commutation is granted upon the recommendation of the district attorney of New York County and of Judge Goff who presided at the trial.

The judge writes under date of January 27, 1916, that he is satisfied from affidavits which have been presented to him that the prisoner's health is in bad condition and that his wife and children are practically speaking destitute, and inasmuch as Solomon has served the greater portion of his minimum sentence, and also owing to fact that his wife and children are in such a lamentable condition, and that the interests of public justice have been substantially satisfied, he feels justified in recommending clemency in this case.

February 8. Andrew M. Rule, alias George M. Loder. Sentenced November 13, 1914; county, New York; crime, forgery, second degree; term, one year; New York Penitentiary.

Commutated to one year, two months, twenty-four days.

This commutation is recommended by Judge Charles C. Nott, Jr., who presided at the trial, and by District Attorney Perkins.

The judge's report is a concise statement of the case and is as follows:

"I beg to state that this defendant pleaded guilty of forgery in the second degree and was sentenced by me under the following circumstances:

"After his plea he testified as a witness for the people upon the trial of an indictment against other defendants in the same case and gave testimony which was important, and I believe true. It appeared that he had been previously convicted of crime in this State, and that he would have, upon a new sentence to States Prison, nearly two years' time to serve on the prior conviction. In view of his services to the State, I sentenced him to one year in the penitentiary upon his present plea, being then under the impression that if he were not sentenced to States Prison he would not have to serve the additional two years due the State. It appears, however, that he has now served his term in the penitentiary and must now serve the additional year and five months. I having sentenced him to the penitentiary on his plea, in my opinion on account of his services rendered to the State, it would be proper for him to receive executive clemency as to the year and five months he is now serving on his old sentence."

February 8. Wendell P. Pearce. Sentenced December 22, 1914; county, New York; crime, grand larceny, second degree; term, two years, minimum, three years six months, maximum; Great Meadow Prison.

Commuted to one year, one month, fifteen days.

This commutation is granted upon the recommendation of Judge James T. Malone who presided at the trial and District Attorney Perkins.

The district attorney in his report makes the following recommendation:

"The evidence disclosed that the prisoner was employed by the Western Union Telegraph Company in this city when in March, 1912, he stole \$129.55 from said company and absconded. Some time later he was arrested and brought to New York City for trial.

“While a fugitive from justice, the prisoner found employment with a concern in Detroit, Michigan, known as Sommers Bros. Match Company. Mr. Frank F. Sommers, one of the firm, interceded in behalf of the prisoner at the time of sentence and since that time has stated that he will re-employ the prisoner and will aid in restitution of his defalcations.

“I have conferred with Judge Malone, who sentenced the prisoner, and he is of the opinion that the imprisonment the prisoner has undergone at the present time is sufficient punishment for him and that he recommends clemency, and I desire to join with him in the said recommendation.”

The judge concurs in the above report of the district attorney.

February 18. Robert Cochrane. Sentenced March 23, 1911; county, Erie; crime, maiming; term, nine years six months; Auburn Prison.

Commutated to three years, eight months, seventeen days, minimum, nine years, six months, maximum.

This commutation is granted upon the recommendation of District Attorney Dudley and numerous petitions which are on file with the case.

District Attorney Dudley in his report states as follows:

“Cochrane was indicted in this county on September 20, 1910, for maiming. At the same time indictments were found against Harry Moran and Joseph Meyers, alias Armstrong, for the same offense. Meyers was tried and convicted and on November 21, 1910, sentenced to Auburn Prison for six years, minimum and thirteen years and six months, maximum. April 24, 1911, Moran pleaded guilty to assault, second degree, and was sentenced to Auburn Prison for two years six months, minimum and five years maximum. Cochrane was placed on trial on February 14, 1911, and February 21st was found guilty by a jury and on March 23, 1911, was sentenced to Auburn Prison for nine years and six months. At the time of the finding of the above indictments Jack Norton and Paddy Jones were jointly indicted with Meyers, Cochrane and Moran for robbery, first degree, but this indictment was dismissed on December 3, 1912.

“ In the spring and summer of 1910 the men employed on the boats sailing from this port went on strike and during that time there was considerable labor disturbance along the docks and water fronts. The boat owners and the Lake Carriers Association filled the places of the strikers with non-union men, and various conflicts between these different interests took place. Among the non-union men employed was one Edward A. Fraser, who came from Canada, and was employed as a fireman on the Minneapolis, a steamship arriving at this port on June 26, 1910. Fraser left the boat on its arrival here, and in going about town met the defendants in a saloon on lower Main street, this city, on June 27th, in the early evening. He swore that they took him over in the yards nearby and cut off one of his ears and cut his leg, and he also swore they stole from his person some \$15 in money, a Lake Carriers' Association book, some revenue stamps which he had and a \$10 Confederate bill. The defendants were subsequently apprehended and a jackknife which Fraser claimed was found in a room which was occupied by Meyers in New York city; the revenue stamps were also found which Fraser claimed were his under a carpet in a room which Meyers had occupied in Buffalo. A short time after Meyers was committed to Auburn Prison there was an explosion in the boiler room there in which Meyers was burned and died soon afterwards. Cochrane remained in the Erie county jail after his conviction for nearly one year before the case was decided by the appellate courts. In the meantime the other two defendants pleaded guilty and were sentenced, Moran receiving a sentence of two years and six months as stated, and Norton receiving a sentence of three years and six months, which will expire the 28th of this month. It was shown by some witnesses on the trial that these defendants were all in the barroom of this saloon on lower Main street. The evidence found was in Meyers' possession. Their association in this saloon had more to do with connecting Moran, Norton and Cochrane than any other fact. I feel that the sentence of Cochrane, Moran and Norton ought to be about the same. Cochrane has served up to this time

nearly three years; he was also confined in the Erie County jail, as stated above, nearly one year before starting to serve his sentence in Auburn, making his present term of imprisonment nearly four years.

“Under these circumstances I am of the opinion that Cochrane has served a sufficient length of time as compared with the term of imprisonment of the other defendants and that if he receives executive clemency at this time it would only be doing justice to this particular defendant. Moran has served his time and is out on parole; I suppose that Norton will undoubtedly be paroled the latter part of this month, so that I believe Cochrane is entitled to a parole or pardon, taking into consideration the sentences of his associates.”

March 9. Gaetano Genovese. Sentenced February 22, 1911; crime, murder, second degree; term, twenty years, minimum, life, maximum; Auburn Prison.

Commuted to five years, one month, minimum, twenty years maximum.

This commutation is granted upon the recommendation of Hon. William W. Clark, the judge who sentenced him and the district attorney.

March 9. Louis Rubkuf. Sentenced May 29, 1914; county, New York; crime, attempted grand larceny, second degree; term, two years six months; Sing Sing Prison.

Commuted to one year, nine months, nine days.

March 9. Charles Bloom. Sentenced May 29, 1914; county, New York; crime, attempted grand larceny, second degree; term, two years six months; Sing Sing Prison.

Commuted to one year, nine months, nine days.

Judge Malone who presided at the trial and the district attorney recommend clemency in these cases. The district attorney states that both of the men rendered valuable service in the prosecution of other cases and by reason thereof should receive clemency.

March 16. Edward Bernstein. Sentenced February 28, 1908; county, New York; crime, burglary, first degree; term, ten years three months, minimum, ten years six months maximum; Clinton Prison.

Commutated to eight years, twenty-two days minimum, ten years, six months, maximum.

This case is recommended by Judge Crain who presided at the trial and by the district attorney who prosecuted the case.

March 16. Henry H. Browne. Sentenced March 23, 1906; county, New York; crime, forgery, first degree; term, twenty years; Sing Sing Prison.

Commutated to eight years, five months, sixteen days, minimum, twenty years, maximum.

This commutation is granted upon the recommendation of Judge Foster who presided at the trial and former District Attorney Jerome who prosecuted the case.

Brown has served over eight years of his sentence and has been a model prisoner. For years he has been editor of the Star of Hope, a prison paper published at Sing Sing Prison.

March 16. William A. Whipple. Sentenced May 20, 1913; county, Monroe; crime, manslaughter, first degree; term eight years, minimum, fifteen years, maximum; Auburn Prison.

Commutated to two years, nine months, twenty-three days, minimum, fifteen years, maximum.

This commutation is recommended by the judge who presided at the trial and by the district attorney who prosecuted the case.

March 16. William H. Young. Sentenced February 17, 1896; county, Montgomery; crime, murder, first degree; his sentence was commuted by Governor Black on March 10, 1897, to life imprisonment. Clinton Prison.

Commutated to twenty years, minimum, life, maximum.

This commutation was virtually a punishment which at that time was imposed for murder, second degree. Since 1987 a law punishing murder, second degree, by a minimum term of twenty years, has been enacted, allowing a person to be released by parole at the end of that period.

Young has served twenty years and one month imprisonment, and I have commuted the sentence to a minimum term of twenty years and a maximum of life, making Young eligible to appear before the Board of Parole at its next meeting at Clinton Prison on March 20, 1916.

March 24. William Flack. County, New York; crime, murder, first degree; sentenced to be executed; Sing Sing Prison.

Commuted to life imprisonment.

This commutation is recommended by Judge Crain who presided at the trial of Flack and by former District Attorney Perkins who prosecuted him.

It is also recommended by all of the living jurors who convicted Flack and by the jury who convicted Leggio; also by Judge Nott who presided at the trial of Leggio and by District Attorney Swann.

Flack was convicted of shooting and killing one Giuseppe Marino. He had no personal interest in the murder but committed it at the instigation of Angelo Leggio, who was actuated by jealousy through Marion's intimacy with Louisa Macaluso, a sweetheart of Leggio's. Prior to Flack's trial he made three confessions admitting that he fired the fatal shot. Upon the trial, however, he denied that he had committed the crime and claimed that the confessions had been extorted from him by police brutality. The Macaluso girl also testified on the trial as an eye witness to the shooting and claimed that Flack had fired the fatal shot. The conviction of Flack was subsequently affirmed by the Court of Appeals. Prior to the argument, however, Flack confessed to Father Cashin, Chaplain of Sing Sing Prison, that he had committed the crime and had testified falsely on his trial, as he did not want to compromise any other persons in the commission of the crime, but inasmuch as he had been convicted and must pay the death penalty, he desired to free his conscience, and requested an interview with the district attorney, which was accorded him, and pursuant to a law which was passed and signed in 1915, allowing a prisoner to be brought from the death house to testify in a murder case, a writ of habeas corpus was obtained for the prisoner and he was brought from prison to the county of New York and testified against Angelo Leggio who had been indicted for murder, first degree.

The prisoner corroborated the Macaluso girl in every detail and testified that he had met Leggio and a man named Patsy about two weeks prior to the commission of the crime and that Leggio had told him that he wanted Marino to be put out of the way and that he would pay the prisoner \$200.00 for committing the

crime. That on the night in question the three of them went to the room of the Macaluso girl to see whether Marino was present and staid about ten minutes, when they left. They returned in about two hours, burst in the door and Flack fired the shot which killed Marino.

Subsequent to the conviction of Leggio, he appealed his case to the Court of Appeals and the judgment of conviction was affirmed by said court, on the 13th day of January, 1916. Leggio committed suicide in the death house at Sing Sing Prison by hanging himself.

Flack is a boy of twenty-two years of age, while Leggio was about thirty-two, and whose mind dominated the mind of Flack, Flack being of inferior mentality. Previous to the trial of Flack a plea of manslaughter would have been accepted but on the advice of counsel the prisoner stated he refused the same.

In view of the history of this case as above recited and in furtherance of justice and being actuated by numerous recommendations made by every official connected with the trial of Flack and the trial of Leggio, I have determined that this is a proper case for the exercise of executive clemency and have acted accordingly.

March 27. Anthony Marenno. Sentenced April 7, 1908; county, New York; crime, robbery, first degree; term, twelve years six months, minimum, sixteen years six months, maximum; Sing Sing Prison.

Commutated to seven years, eleven months, eighteen days.

I have been advised by competent physicians that this man is suffering from advanced stages of pulmonary tuberculosis. I have also been assured by persons interested in Marenno that he will be taken care of immediately upon his release.

April 6. Antonio Caitoto. Sentenced April 17, 1908; county, Wyoming; crime, manslaughter, first degree; term, twelve years, minimum, twenty years, maximum; prison, Auburn.

Commutated to seven years, eleven months, fourteen days, minimum, twenty years, maximum.

This case is recommended for executive clemency by Judge Norton who presided at the trial and by the district attorney of Wyoming county.

April 12. Joseph E. Topper. Sentenced May 20, 1914;

county, New York; crime, attempted extortion; term, two years six months, minimum; five years, maximum; Sing Sing Prison.

Commuted to one year, ten months, eight days, minimum, five years, maximum.

This commutation is recommended by Judge Wadhams who presided at the trial and District Attorney Perkins.

April 17. Teresa Marino. Sentenced March 12, 1914; county, Monroe; crime, manslaughter, second degree; term, five years, minimum, ten years three months, maximum; Auburn Prison.

Commuted to two years, one month, eleven days, minimum, ten years, three months, maximum.

This commutation of sentence is recommended by Judge Clark who presided at the trial and by the district attorney who prosecuted the case. Both of these officers state that the time this woman was kept in the jail in Monroe county, together with the time spent in Auburn Prison is over three years, and they believe that she has been sufficiently punished.

May 10. Antonio La Salle. Sentenced April 6, 1915; county, New York; crime, murder, second degree; term, twenty years, minimum, life, maximum; Sing Sing Prison.

Commuted to seven years, six months, minimum, life, maximum.

May 10. Joseph La Salle. Sentenced April 12, 1915; county, New York; crime, murder, second degree; term, twenty years minimum, life, maximum; Sing Sing Prison.

Commuted to seven years, six months, minimum, life, maximum.

These commutations of sentence are recommended by former District Attorney Perkins of New York county who stated that both of the men had rendered such valuable service to the State in other important murder trials that without their testimony it would have been impossible for the district attorney to have successfully prosecuted the cases and obtained a conviction.

The district attorney also informs me that at the time these men were placed upon trial that he would have been willing to have accepted a plea of guilty of manslaughter, first degree, because he did not at that time think that he had sufficient evidence to convict them on the murder charge.

If these men had been convicted of manslaughter, first degree, they could not have received a sentence which would have exceeded

a maximum of twenty years, and it would have been the duty of the court if they were so convicted to have imposed an indeterminate sentence, with a minimum and maximum penalty of twenty years.

In view of these facts and upon the recommendation of former District Attorney Perkins, I have concluded to commute the sentences as above stated.

May 26. Francis J. Fowler. Sentenced March 2, 1915; county, Suffolk; crime, murder, first degree; sentenced to be executed; Sing Sing Prison.

Commuted to life imprisonment.

Fowler was convicted of murder, first degree, in Suffolk county, for killing one Frank Sammis, in March, 1915.

Judge Kelly who presided at the trial of Fowler makes the following recommendation:

“ While the defendant is guilty of the homicide, and sane, under the provisions of the law, as found by the jury, I consider it my duty to say to you, that in my opinion, a commutation of the sentence to imprisonment for life would be a merciful disposition of his case, and would, I think, fulfill the requirements of justice for the following reasons:

“ The defendant is a man of low order of intelligence. He is a ne’er do well — who followed the sea for the greater portion of his life. Coming from a respectable family, he wandered off from his home ties, and his life was dissolute and depraved in every way. These things, of course, do not excuse him in the eyes of the law, but I do not think he was ever convicted of crime before. His surroundings as a sailor and his life as a whole were very unfortunate. He is, I fear, a sexual pervert. He has suffered from all forms of venereal disease, and I fear, has little perception of the dreadful situation in which he is placed. He formed a criminal intimacy with the sister of his employer, the man whom he killed — a woman older than himself, and who encouraged the unfortunate and ignorant defendant, — who was working as a farm hand for her brother. It is difficult to spell out the motive for his crime except from his diseased imagination, and the use of liquor. He is an unfortunate, and has been a wanderer and an outcast for the greater part

of his life. With better surroundings, with better training, I suppose he would have avoided this dreadful catastrophe. It is a case which in my opinion, warrants inquiry by the executive, to ascertain his present condition, and if in the exercise of the great power vested in you, you see fit to give him his life, directing his imprisonment for life instead, I feel that it would be a merciful and proper disposition of the matter. The views here expressed have been my views since the date of the conviction, but I have not wished to intrude them upon you until I was called upon to do so."

In view of above recommendation I deem this a proper case for the exercise of executive clemency and have acted accordingly.

June 13. John A. Kirby. Sentenced December 30, 1914; county, New York; crime, attempted grand larceny, first degree; term, two years six months, minimum, four years six months, maximum; Great Meadow Prison.

Commutated to one year, five months, twelve days.

This commutation is granted at the request of Mr. Robert Hilliard of New York City who was the complainant in the case and who writes me that at the time of Kirby's conviction he thought that he would receive a sentence not greater than six months.

In view of the attitude of the complainant and the fact that he had served the minimum time above mentioned, I have determined it was proper case for commutation and have acted accordingly.

June 17. Arthur S. Martin. Sentenced December 9, 1911; county, Clinton; crime, rape, first and second degrees; term, nine years, minimum, twenty years, maximum; Clinton Prison.

Commutated to four years, six months, ten days, minimum, twenty years, maximum.

This commutation is granted upon the request of the judge who imposed the sentence and the district attorney who prosecuted the case. The district attorney made a report to me, wherein he stated:

"The petitioner, Arthur S. Martin, is a young man of the age of twenty-five years. He was convicted of the crime of rape, first degree and rape, second degree in December, 1911, in the Supreme Court sitting in this county, Mr. Justice Joseph A. Kellogg, presiding. At that time I was district

attorney and handled the case of the people. The applicant was residing at that time and had been for some time before at the village of Lyon Mountain in this county. This is a mining town where the mines of the Delaware & Hudson Railroad Company are located. The population of that town is such as is usually found in mining towns. Martin is a fine looking young man and appears quite intelligent. At the time of his arrest he was a married man. He had left his home in Franklin county and settled in Lyon Mountain. His wife was a widow much older than he. She is a very inferior woman with very little intelligence and of a very much lower type than Martin. That seems to be the unfortunate incident in his life as far as an outsider is permitted to judge in such things. Martin associated in Lyon Mountain with some people who were of much lower class than himself. I mean by this of lower intelligence and of quite a different manner of living. You will note in the petition the name of one John Bratt. This man Bratt took quite a prominent part in this case. Martin's wife had a daughter by former marriage. In 1911 she was about 16 years of age. She lived with her mother and the petitioner. The petitioner's wife had other younger children living in the same household. Bratt was himself an ex-convict and had served a term in State Prison and was living in Lyon Mountain. He was quite active in the prosecution of the petitioner. At the time of the prosecution I wondered at his zeal and his interest in this girl and in her mother, the wife of the petitioner.

"This can be explained perhaps by the statements contained in the affidavit of Leafey Elliott verified June 7, 1912, and on file with you. Of course, I cannot vouch for the truth and accuracy of all of the statements in this affidavit, but my recollection is that it is substantially correct. It is a fact that there was some interference of some kind by Bratt in the family affairs of the petitioner. Martin's wife and this girl did go back and forth from the Martin household to the household of Bratt. I have no knowledge of the statements of Bratt mentioned in this affidavit.

"After Martin's arrest which occurred sometime in October, 1911, he was confined in the county jail at Plattsburgh, and on December 8, 1911, an indictment was filed against him charging him with the crime of rape in the first degree. * * * Martin was not represented by counsel during any of the proceedings. The wife and the witness Leafey Elliott and her sister Geneva Elliott were the principal witnesses before the grand jury. At the end of the December term when the indictments were filed, Martin was arraigned before Mr. Justice Joseph Kellogg with the other prisoners. On being asked to plead to the indictment, he entered a plea of guilty and Justice Kellogg sentenced him to a term of nine years and ten months with the maximum twenty years in Clinton Prison.

"Later Mr. William P. Badger of Malone came to see me on behalf of Martin. The matter was not gone into at that time very extensively. A few months ago Mr. A. B. Cooney presented this matter to me again and asked me to go into the case carefully. I have examined the petition and affidavits on file in your office and have written to Martin and discussed the case with Mr. Cooney. You will note in the affidavit of Leafey Elliott, the complaining witness referred to, that she has retracted her accusation made against the defendant. Of course, I recognize that a retraction standing by itself might not be conclusive. As a general principle it might be frequently done in many criminal cases. Standing by itself I would not put much weight upon it on this application, but together with all the circumstances of this case and in justice to the petitioner, it requires me to say to you that I am very doubtful of his guilt.

"I, therefore, recommend to your excellency that the petitioner, Arthur S. Martin, receive executive clemency."

The judge in a complete report which is herein set forth stated as follows:

"This man was sentenced by me to the extreme penalty for the first offense of rape in the first degree.

"He plead guilty and made no explanation, and as a very atrocious crime was disclosed by the minutes before the grand jury I imposed the severest sentence.

"I now find that the principal witness has retracted the charge and County Judge Hogue, then district attorney, being doubtful of the guilt of the petitioner, recommends the exercise of executive clemency.

"As my action was based entirely upon the plea of guilty, which may have been interposed by a man, uneducated and friendless, at the suggestion of his custodians, together with the grand jury minutes, and the statement of the district attorney as to his information concerning the facts, and in view of the very doubtful reliability of the witness as now disclosed, and fearing a possibility that grievous wrong may have been inflicted upon this man, already confined in prison nearly four years, I desire to join with the then district attorney in recommending to your excellency the exercise of executive clemency in this case."

In view of the attitude of the judge who imposed the sentence and the district attorney who prosecuted the case, and of other persons interested in the application, it appeared to me to be a proper case for the exercise of executive clemency and have acted accordingly.

June 22. Michael Lee Eisenberg. Sentenced February 3, 1911; New York county; crime, forgery, second degree; second offense; term, twenty years; Great Meadow Prison.

Commutated to six years, six months, minimum, twenty years, maximum.

The reason for the severe sentence received by Eisenberg was that he had been convicted of a crime, previous to the one he was sentenced for and the judge had no discretion, except to impose the sentence which he did.

In view of the fact that Eisenberg has rendered the State great service while in prison, in performing the services of a dentist, and upon the recommendation of various prison officials, I have commuted his sentence as above stated.

June 22. Joel C. Rundle. Sentenced February 15, 1901; county, Orange; crime, murder, second degree; term, twenty years, minimum, life, maximum; Sing Sing Prison.

Commutated to fifteen years, three months, three days.

This commutation is recommended by the former district attorney of Westchester county, who is now the county judge, and

by the judge who presided at Rundle's trial. The Governor has also been petitioned by many Grand Army Posts of the State to commute the sentence, Rundle having been a veteran of the Civil War. At the present time he is paralyzed and has to be wheeled around in a wheel chair. He has relatives who are anxious and willing to take care of him, and in view of his helpless condition, and of the services he rendered to his country in the Civil War, I have commuted his sentence.

June 28. Antonio Giordano. Sentenced December 28, 1915; county, Monroe; crime, murder, first degree; to be executed; Sing Sing Prison.

Commuted to life imprisonment.

Giordano's sentence was affirmed by the Court of Appeals but two of the judges dissented, they being Chief Judge Bartlett and Judge Hogan.

Chief Judge Bartlett has written to me in regard to this case and says:

"I deem it my duty to inform you of the reasons which led me to dissent. It seemed to me that the facts proved brought the case precisely within the definition of murder in the second degree which contemplates an intentional killing but a killing without premeditation and deliberation but negatived the existence of either element. I therefore reached the conclusion that while the defendant merited conviction of murder in the second degree he should not have been convicted of the higher grade of murder.

"I write this letter in the hope that you may see fit to commute the sentence of Giordano to imprisonment for life."

Judge Hiscock also writes favoring a commutation of sentence and says:

"There was no question that the convicted man killed his victim. There was a very serious question, however, whether he was guilty of that premeditation and deliberation which made his crime murder in the first degree. Two members of the court including the chief judge, dissented from our affirmance on the ground that the evidence did not justify the jury in finding such premeditation and delibera-

tion. The remaining members of the court thought there was sufficient evidence to permit the jury to find the verdict which it did if it took the view of the evidence urged by the people, and that therefore we were not justified in reversing the judgment. All of the members of the court, however, who voted for affirmance, with one or two exceptions felt that they would have been better satisfied if the jury had contented itself with finding a verdict of murder in the second degree, and under these circumstances I was authorized by the members of the court, with one possible exception, to state to you that in their judgment this was a case where you might, if you so chose, very properly exercise the discretion reposed in you to commute the sentence from death to imprisonment."

In view of the attitude of the judges of the Court of Appeals on this question and the statements which have been made to me I deem it my duty to commute the sentence to life imprisonment.

June 28. Henry C. Merritt. Sentenced October 23, 1914; county, Westchester; crime, grand larceny, first degree; term, three years six months, minimum, six years six months, maximum; Sing Sing Prison.

Commuted to two years, minimum, without compensation, six years six months, maximum.

This commutation of sentence is recommended by Judge Morschauser who presided at the trial at the time of conviction, and also by the district attorney of Westchester county, Hon. Frederick E. Weeks.

Judge Morschauser in his report makes the following recommendation:

"After a visit to the prison and knowing the physical condition of Merritt at the time of his conviction and his condition at the present time, by personal observation, I am satisfied that there will be no injustice done to the people of this State by making a commutation of sentence."

The district attorney makes a similar recommendation. Numerous individuals have also taken the same position in reference to this case, and in view of the recommendations on file I have

determined that it is a proper case for the exercise of clemency and accordingly commute the sentence as above stated.

June 28. Gennaro Mazzella or Maziello. Sentenced June, 1915; county, Kings; crime, murder, first degree; to be executed; Sing Sing Prison.

Mazzella or Maziello, convicted in Kings county in June, 1915, of the crime of murder, first degree. His sentence was affirmed by the Court of Appeals and he was sentenced to be electrocuted during the week beginning April 10, 1916. A respite however was granted by the Governor on March 22, 1916, until the week beginning June 12, 1916, for the purpose of presenting an application to the Court for a new trial on the ground of newly discovered evidence. An extension of respite was granted on May 31, 1916, until the week beginning July 10, 1916, on the motion for a new trial before Mr. Justice Manning, which motion was denied.

Mr. Justice Manning writes as follows:

“Upon the argument for a new trial there was presented to me certain evidence as to the man's good character and testimony as to the bad and quarrelsome character of the man he shot and also certain other evidence not presented upon the trial, which if not in itself sufficient to warrant me in granting the new trial, is, however, of sufficient gravity and importance to justify me in stating to you that in my opinion the case is one wherein you would be justified in extending to the condemned man such executive clemency as you deem proper.

I may add to this letter that I have consulted with the district attorney who prosecuted the case and who opposed the motion for a new trial and he has approved of the action which I take in sending you this letter and will join in the recommendation for executive clemency.”

From the evidence presented, it would seem as though the story told by the defendant that he acted in self-defense was substantiating.

In view of the recommendation of the judge, which is concurred in by the district attorney, and of others who have made

a careful study of this case, I am satisfied that the ends of justice will be more substantially conserved by a commutation of sentence to life imprisonment.

July 12. Moses Gutman. Sentenced January 20, 1914; county, New York; crime, forgery, second degree; term, four years six months, minimum, nine years six months, maximum; Great Meadow Prison.

Commutated to two years, five months, eight days, minimum, nine years six months, maximum.

This commutation of sentence is recommended by District Attorney Swann and by Judge Mulqueen.

The report of the district attorney is under date of April 12, 1916, and states that the prisoner has rendered valuable service to the State in the prosecution of Hyman Fish, and closes his recommendation by saying, "I recommend that his sentence be commuted so that his term of imprisonment will end at once." Judge Mulqueen who presided at the trial endorses the recommendation of the district attorney for clemency and also recommends that Gutman be released at once.

In view of the above recommendations I have commuted the sentence so that Gutman may be released by the Parole Board.

July 18. Robert O'Brien. Sentenced December 12, 1912; county of Livingston; crime, grand larceny and burglary, second degree; term, five years six months, minimum, six years six months, maximum; Auburn Prison.

Commutated to three years, seven months, six days.

This commutation of sentence is recommended by the district attorney of Livingston county who prosecuted the case. In his report to the Governor the district attorney makes the following recommendation:

"O'Brien was jointly indicted with one O'Connell for breaking into a hotel at Portage, N. Y., and stealing some money, whiskey and a few cigars. The money was found in a nearby woods, as well as the other property excepting what had been consumed and all returned to the owner.

"O'Brien was employed by the Erie Railroad Co., and lived in a nearby shanty belonging to the company.

"None of the witnesses produced by the people saw the

crime committed and O'Connell pleaded guilty, and about the only evidence connecting O'Brien with the commission of the crime was an alleged confession made to Deputy Sheriff O'Leary.

"It appeared that O'Connell had been hanging about Portage for some time prior to the commission of the crime and frequently went to the O'Brien shack and on the night when the crime was committed brought there three or four quarts of whiskey, and that they both drank some of it, and then after a time O'Brien ejected O'Connell from the shack and went to bed; that at this time O'Connell had in his possession some money and O'Brien asked him where he got the whiskey and money and he said that he took it from the hotel, and then according to O'Brien's story he put him out, and O'Connell went into the woods and hid the money and was caught there the next day by the officers with the whiskey and also turned over the money which he previously concealed.

"On the day following O'Brien went to work as was usual with him and was arrested while at work, and it developed as a part of the defendant's case that he made his alleged confession to Officer O'Leary after he was handcuffed, and given a quantity of whiskey.

"The case was submitted to the jury by Judge Carter upon the grounds that O'Brien was the man who laid the plans and that O'Connell did the job.

"I am informed that it was shown upon the trial that the defendant had never before been convicted of any crime.

"And that O'Connell testified upon the trial that he committed the crime and that O'Brien had nothing to do with it.

"It seems to be the general notion prevailing with the sheriff's force and with others who heard the trial that this defendant has been sufficiently punished and that it is a proper case for the exercise of executive clemency."

Since the conviction of O'Brien, Judge Carter who tried the case has died.

July 21. Max Swersky. Sentenced January 21, 1914;

county, New York; crime, violation of section 190 of the Penal Law; term, one year nine months, minimum, three years eight months, maximum; Sing Sing Prison.

Commuted to six months, thirteen days, minimum, three years, eight months, maximum.

This commutation of sentence is approved by Dr. Magnes, chairman of the Kehillah; former Warden Kirchwey of Sing Sing Prison; Commissioner Joseph Barondes; ex-Deputy Police Commissioner Newburgher and Dr. S. Buechler, the Jewish chaplain in Sing Sing Prison.

Commissioners Newburgher and Barondes have agreed to care for Swersky if he is paroled.

August 2. Eugene Dumas. Sentenced June 14, 1912; county, New York; crime, grand larceny, second degree, two charges; terms, four years and three years eleven months which equals seven years eleven months; Sing Sing Prison.

Commuted to four years, one month, eight days, minimum, seven years eleven months, maximum.

Dumas is now suffering from an advanced case of cancer of the tongue, and Dr. William Seaman Bainbridge who operated upon him on June 26, 1916, says that he has but a short time to live.

The report from the district attorney says, "I am informed that the first term of imprisonment imposed upon the prisoner has already expired and that he is now serving the second sentence imposed. It is further stated to me that the prisoner is in delicate health and if, in your judgment, the time already served by him is sufficient expiation for his crimes, I know of no reason why a commutation of his sentence should not be granted." Upon the report of the district attorney and the information of the physician, I have commuted his sentence.

August 7. Onne Talas. Sentenced November, 1915; county, New York; crime, murder, first degree; to be executed; Sing Sing Prison.

Commuted to life imprisonment.

This commutation is recommended by the judges of the Court of Appeals who affirmed the judgment of conviction on appeal. Talas was convicted of murder in the first degree on the theory

that he was a party to the commission of the crime, namely the robbing of his employer, Mrs. Nichols, which resulted in the killing of the latter.

Talas was a servant in the household of Mrs. Nichols and one Arthur Waldenen suggested to him that some night he would come to the house when other servants were out and if Talas would let him he would rob Mrs. Nichols and divide the proceeds of the crime. Waldenen had been a servant in the Nichols household prior to the time that Talas was employed there, and was instrumental in obtaining Talas his position. On the night of the commission of the crime Waldenen appeared with two men known as Eddie and the "Wop." Talas let them in the basement door and they tied his hands and left him. They then proceeded upstairs where they strangled to death Mrs. Nichols and robbed her of her jewelry.

Prior to the time of his trial Talas made a confession substantially admitting the story as heretofore set forth.

Section 1044 of the Penal Law provides as follows:

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; *or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise.*

Under our statutes burglary and robbery are felonies.

A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal.

So, where several persons combine together for the purpose of committing a burglary or robbery, and death results to a third person from the act of one of them in carrying out the common design, they are all criminally responsible as principals.

At the time of the trial the jury, after deliberating for nearly four hours, returned to the court and stated "Your Honor, it is respectfully requested by this jury that they be advised if it is not in some way possible to render a verdict in lesser degree than murder in the first degree." The court thereupon instructed the jury that the form of the verdict should be either not guilty or guilty of murder in the first degree, which is, of course, in accordance with the law. Thereupon the jury, after further deliberation, found the defendant guilty of murder in the first degree.

Talas, a boy of 22 years of age, was born in Finland, he came to this country when he was about 17 years of age. His record up to the time of his conviction had been good, and his participation in the crime was probably due to his youth and ignorance of the probable consequences, both to Mrs. Nichols and himself. None of the other persons implicated in the murder have been apprehended.

I have been advised that all of the members of the Court of Appeals are of the opinion that under all of the circumstances, the case is one where I might very well exercise the power of commutation of the death sentence and one of the judges was authorized by the members of the court to express this opinion to me.

In view of the summary of the case as above set forth, and the recommendations of the judges of the Court of Appeals, I have determined that this is a proper case for the exercise of executive clemency and have acted accordingly.

August 15. Ralph Dubocq. Sentenced March 30, 1914; county Kings; crime, grand larceny, second degree; term, two years six months, minimum; four years six months, maximum; Sing Sing Prison.

Commutated to two years, four months, fourteen days.

I have received a certificate from Dr. John E. Wade, a physician residing in Brooklyn, who states that he is attending the prisoner's wife, that she is in a serious condition and that, in his opinion, she cannot live more than two or three days.

The district attorney has recommended that the commutation be granted.

August 25. William Wilson. Sentenced February 26, 1912; county, New York; crime, grand larceny, first degree; term, ten years; Great Meadow Prison.

Commuted to three years, seven months, nineteen days, minimum, ten years, maximum.

This commutation is recommended by District Attorney Swann, of New York county who writes that Wilson has rendered valuable service in giving information to the district attorney's office, which was of material assistance in other criminal prosecutions.

The district attorney states:

“ I believe the ends of justice would be conserved by commuting the sentence of the said William Wilson to the time actually spent in jail and placing him under the jurisdiction of the State Board of Parole for the balance of his term.”

Judge O'Sullivan, at the time of imposing sentence, said that he had no discretion in the matter, but under the statute was compelled to impose a straight ten year term. He intimated at the time of the sentence, however, that at a later date, Wilson's case should receive consideration.

September 12. David Kassowitz. Sentenced April 22, 1915; county, New York; crime, burglary, third degree; term, two years six months; Auburn Prison.

Commuted to one year, four months, eighteen days, minimum; two years six months, maximum.

Judge Wadhams before whom the prisoner was convicted has recommended clemency in his behalf and states in his communication that in view of the services Kassowitz has rendered to the State in testifying in other cases he believes that clemency should be exercised in his behalf.

The district attorney in his communication relative to the case, after stating the facts in connection therewith says that Kassowitz rendered services to the people which were of considerable value.

In view of the communications of Judge Wadhams and the district attorney, I have determined to commute the sentence so that Kassowitz may appear before the Parole Board and be released.

September 12. Adolf Mandel. Sentenced May 4, 1915; county, New York; crime, violating section 295 of the Penal Law; term, two years six months, minimum; five years, maximum, and to pay a fine of three thousand dollars; Sing Sing Prison.

Commuted to one year, four months and two days.

Mandel was a private banker and was convicted of receiving deposits when his bank was in an insolvent condition. He has been substantially punished, having served on September 11th, sixteen months of his minimum term. Under the amended Prison Law of 1916, his minimum term would expire on June 30, 1917, and he would then be eligible to be released by the Parole Board.

I have given several hearings on this matter and on the 9th of September a final hearing was had at which time it was represented by the applicants for clemency in behalf of Mandel that all of the large depositors in his bank were in favor of clemency being extended to him on the ground that ever since his imprisonment he has aided in every way in his power to straighten out the affairs of the bank and has been of valuable assistance to the depositors thereof. His wife has released all of her dower interests in his property, so that the same might be turned over for the benefit of the depositors.

In view of the unanimity of the depositors in this matter and being satisfied of Mandel's efforts to make restitution, so far as lies in his power, I have determined that it is a proper case for the exercise of clemency and have commuted his sentence.

September 16. Alfred Schwitofsky. Sentenced June 5, 1911; county, New York; crime, burglary, second degree, and assault, first degree; term, twenty years; Sing Sing Prison.

Commuted to five years, three months, two days.

The defendant was arrested in January, 1911, charged with the burglary of the house of one Dale. The arrest occurred about ten days after the crime was committed. The police officers were told by an accomplice in the crime who the defendant was and where he could be found, and he was thereupon imprisoned, was indicted as a second offender, tried and convicted and sentenced to twenty years in State Prison at Ossining, N. Y.

The conviction was unanimously affirmed by the Appellate Division after a motion for a new trial was denied by the trial judge.

The defendant has a long criminal history; was convicted twice of larceny in New Jersey, once of larceny in Pennsylvania and he

pleaded guilty of burglary in New York prior to the crime for which he now suffers imprisonment. He has been known by the aliases of Welz, Walz and Gerber.

After his committal to State Prison the persons interested in his case asserted his innocence of the crime and procured the appointment by Governor Glynn of the members of the Parole Board as a Commission to inquire into the defendant's crime. The report of the Parole Board was submitted to Governor Glynn under date of October 19, 1914, and they made the following recommendation:

“The prisoner has served a term of imprisonment since June 5, 1911. This imprisonment appears to have been sufficient to entitle him to the benefit of a parole, so that if during his period of qualified liberty he may by good conduct earn an absolute discharge.”

There was no claim in the report of the Parole Board of the innocence of Schwitofsky. This report was before Governor Glynn from October 19, 1914, until December 31, 1914, and he declined to release the prisoner.

Under date of March 31, 1915, I submitted to the Parole Board the following questions for their specific findings:

(1) Was Alfred V. Schwitofsky in the house of Theodore B. Dale on the date alleged in the indictment?

(2) Was he armed with a pistol when he entered the house?

(3) Is he the same person who was seen by and identified by the employees of Dale, and by Harold Rivers and Bruen, the chauffeurs?

All of the questions submitted were answered in the affirmative and the questions and answers as given by the Board are as follows:

Question 1. Was Alfred V. Schwitofsky in the house of Theodore B. Dale on the date alleged in the indictment?

Answer: Yes.

Question 2. Was he armed with a pistol when he entered the house?

Answer: He was armed with a pistol when he entered the house, but that such pistol was loaded with blank cartridges.

Question 3. Is he the same person who was seen by and identified by the employees of Dale, and by Harold, Rivers and Bruen, the chauffeurs?

Answer: Yes.

This establishes beyond a question that Schwitofsky was guilty of the crimes charged.

There is no doubt of the defendant's guilt, nor that his attempt of two years ago to procure his discharge on a claim of innocence was fraudulent. Now, however, application is made for executive clemency based upon the defendant's physical and mental condition. His history shows him to have been once committed to the Matteawan Asylum for the criminal insane. He is now alleged to be showing symptoms of mental disturbance.

Judge O'Sullivan in his report to Governor Dix in 1912, concluded as follows:

"As you will recall the double conviction was of second offenses. The law in that case imposes a minimum below which the court cannot go, and in this case the minimum was ten years on each offense; whether the court was or was not disposed to impose a lighter sentence there was no legal possibility of doing so.

"It is not at all improbable that I would have imposed a lighter sentence had it been in my power to do so. I do not believe that suspension of sentence for either offense was within the domain of justice or legal propriety. However, if at a later date executive clemency shall be inclined to do that which the court had no power to do, namely to reduce the term of the defendant's imprisonment, I do not believe that justice shall suffer."

In a report from the district attorney of New York county under date of December 31, 1913, to Governor Glynn, the district attorney (now governor) stated as follows:

"Before Judge O'Sullivan's death I consulted him respecting this case and it was his desire that when a proper

period had elapsed the sentence of the prisoner be commuted to ten years. Judge O'Sullivan stated to me that he had imposed the shortest sentence possible under the law and that had he the power he would have sentenced the prisoner to a term not in excess of ten years. Because of Judge O'Sullivan's recommendation to me, and because of the further investigations which show that as to the assault conviction the degree of that crime for which he was sentenced was not fully established. I believe that the prisoner's sentence might properly be commuted to the term of ten years, which was the term imposed upon him under the conviction of burglary in the second degree."

In view of the recommendation of Judge O'Sullivan and the report of the district attorney as above set forth that the sentence be reduced to ten years, under which the prisoner would be compelled to serve six years and six months, and the fact that he has served a period of five years three months and two days, and in view of the entire case and the fact that Schwitofsky has now suffered a substantial term of imprisonment, and charitably disposed persons have agreed to care for him in the future, I have commuted his sentence.

September 27. Frank J. Walrath. Sentenced February 22, 1912; county, Rensselaer; crime, attempted arson, first degree; term, five years, minimum, seven years two months, maximum; Great Meadow Prison.

Commutated to four years, seven months, six days.

This commutation of sentence was granted upon the recommendation of the judge who presided at the trial and the district attorney who prosecuted the case.

The district attorney in his communication to me under date of January 14, 1916, states:

"This was his first conviction and he has served practically four years. I believe the cause of justice will be fully subserved if a pardon be granted to him, and I heartily recommend the same."

The judge in his report under date of November 9, 1915, states that the attempt to commit the offense was not made in a vicious

way, but rather, with the abandon of a careless, indifferent boy. There had previously been fires and attempts at fires in the vicinity, and sentiment ran high against Walrath when it was shown that he had committed the crime to which he pled guilty but so far as the judge could remember there was no evidence of any kind tracing the other attempts to Walrath.

The judge says that he has made a careful examination of the sentiment of the community, and is satisfied that no mistake will be made if clemency be granted.

In view of the above recommendations I have commuted the sentence.

September 28. Charles Alderwick. Sentenced November 17, 1913; county, Oneida; crime, rape, first degree; term, five years, minimum, eight years six months, maximum; Auburn Prison.

Commuted to two years seven months sixteen days.

The district attorney who prosecuted the case under date of September 13, states as follows:

“I am informed that this young man has been a model prisoner at Auburn, and I felt at the time that his sentence was rather severe, and while I think the transaction merited a severe punishment, if there is any good left in Mr. Alderwick it would seem that he might be given an opportunity now to demonstrate it.”

The judge who presided at the trial, after stating the facts in the case, says:

“As to whether the question of executive clemency should be allowed, after mature deliberation, I am quite inclined to favor it. I am informed by the warden of the prison that since he has been there Alderwick has been a model prisoner, and I think that is ground for hope that he has been taught a severe lesson and that he may behave himself hereafter.”

Numerous citizens of the city of Utica where the transaction occurred have written in his behalf, and in view of the fact that the prisoner has already been severely punished, and the numerous recommendations asking for his release, I have commuted his sentence accordingly.

September 28. Harold Rich. Sentenced May 20, 1914; county of Bronx; crime, forgery, second degree; term, seven years six months; Sing Sing Prison.

Commuted to two years, three months, twenty-eight days.

Judge Gibbs who presided at the trial, in a communication under date of June 9, 1916, states that he has seen Rich at the prison and is satisfied that since his confinement he has reformed, and says that he has concluded that the application for executive clemency is well merited, and he begs that the governor approve the application.

The district attorney who prosecuted the case in two communications, one under date of May 26, 1916, and one under date of September 25, 1916, does not oppose clemency. Numerous people are interested in Rich and that employment has been secured for him by those interested in him and he will be properly taken care of if released.

September 30. Morris Friedman. Sentenced July 26, 1915; county, Kings; crime, criminally receiving stolen goods, second offense; term, five years one month; Auburn Prison.

Commuted to ten months.

Friedman was originally convicted in Kings county and sentenced in June, 1915, to one year in the penitentiary. After serving a portion of his sentence he was brought to court on a writ of habeas corpus and re-sentenced to five years and one month. Friedman has already served under both sentences one year and three months on September 29.

The judge who presided at the trial of Friedman states in his communication that he thought the man ought not to have received a greater sentence than one year.

In view of the judge's recommendation, and the fact that Friedman has now served fifteen months, I have commuted his sentence accordingly.

October 6. Charles A. Clary. Sentenced March 22, 1916; county of Ontario; crime, perjury; term, one year six months, minimum; two years six months, maximum; Great Meadow Prison.

Commuted to six months, ten days.

Both the judge and district attorney in this case have advised

me that they think the man has been sufficiently punished and should be released. Supreme Court Justice Benton who had the matter before him in a civil way advises me that there is no question of the man's guilt but that the ends of justice have been served, and he recommends Clary's release.

In view of the recommendations of Judges Benton and Baker and also the district attorney, I have accordingly commuted the sentence.

December 4. Charles Frederick Stielow. Sentenced July, 1915; county, Orleans; crime, murder, first degree; to be executed; Sing Sing Prison.

Commuted to life imprisonment.

No other criminal case, where clemency has been asked, has perplexed and distressed me as has this.

The crime of which defendant has been convicted, is one of the most atrocious in the history of the State.

Two burglars murdered an unarmed man in his home in the dead of night and added to the hideousness of their offense the murder of a defenseless woman fleeing for her life.

The intense feeling against the perpetrators of the crime in the community where it was committed is natural and is justified.

I realize that a governor, who interferes with a judgment of the courts of this State, without a good and sufficient cause, is himself committing a lawless act.

I believe that Stielow is guilty. Perhaps never in the history of New York has a man been afforded greater opportunity to establish his innocence if that be possible. Twelve jurors and ten judges have passed upon this case without one dissenting opinion indicated or expressed. The situation, however, so far as I am able to learn, is unprecedented.

Another man, under the sanctity of an oath, with all the solemnity possible under the conditions, has confessed that he and not Stielow committed the crime. There is considerable of detail and circumstance in the King confession and in the facts surrounding it as yet unexplained and to me unaccountable. To be sure, the King confession has been repudiated and so has the Stielow confession, without which Stielow could not have been convicted. I believe that King's confession is a lie.

I can not escape the conviction, however, in the light of all that

has been presented to me and which was not before me when I denied the last application for clemency after I had granted three reprieves, that there is a possibility, perhaps more than a possibility, that this defendant is not guilty.

I think I am doing right in commuting his sentence to imprisonment for life.

The procedure in the courts has been correct. The action of the judges on motions for a new trial has been absolutely right.

The King confession, uncorroborated and repudiated by himself, could not be introduced under our rules of evidence, as has been very clearly set forth by Justice Rodenbeck, but I believe, and I speak from years of experience in the trial of criminal cases, that no jury in this country would have convicted Stielow of murder in the first degree with the King confession before it.

I commute the sentence of the court to imprisonment for life.

December 5. Selig Levine. County of New York; crime, burglary, first degree; term, twenty years, minimum, life maximum. Sentenced May 27, 1910; Clinton Prison.

Commuted to six years, six months, twenty-two days, minimum, life maximum.

This commutation of sentence is recommended by Judge Malone who presided at the trial of Levine and by myself when district attorney.

Judge Malone in his communication states as follows:

"I informed counsel for Levine some considerable time after the date of sentence that at the expiration of five years, if his prison record was good and application was made to the governor, I would say to him that in my opinion sufficient punishment had been suffered by Levine to meet the ends of justice, and that his case was a proper case, in my judgment, for the exercise of executive clemency. That period has not been reached and I take pleasure in conveying to you my favorable attitude in the premises, in view of the application which is in your hands."

Judge Malone's report is under date of October 14, 1915, so that Levine has served over an additional year since that recommendation.

The district attorney of New York county (now governor), under date of October 6, 1914, in a communication to the governor stated that he concurred in the recommendation of Judge Malone.

December 6. Anselmo Perrotta. Sentenced December 7, 1906; county, Monroe; crime, murder, second degree; term, life; Auburn Prison.

Commutated to ten years, minimum, life, maximum.

Since Perrotta was sentenced the law has been changed, and the punishment under such changed law for murder, second degree is imprisonment to a minimum term of twenty years and a maximum term of life.

The commutation of sentence is granted upon the recommendation of the judge who presided at the trial and the district attorney who prosecuted the case. In their recommendations they state to the governor that in their judgment the man has been sufficiently punished by serving ten years for the crime.

Perrotta at the time of his conviction could not understand a word of English, and most of the witnesses in the case who were Italians were in the same position.

The prisoner has always maintained that he defended himself against an attack, and if he had not done so he would have been killed.

In view of his perfect record in prison, and the fact that he has served ten years, and acting upon the recommendation of the judge who presided at the trial and the district attorney, I have concluded that it was a proper case for the commutation of the sentence to a minimum term of ten years and a maximum term of life, so that the Parole Board might, if they were satisfied, release this man under parole.

December 12. Joseph Toblinsky. Sentenced March 24, 1913; county, New York; crime, grand larceny, second degree and burglary, third degree; term, ten years; Sing Sing Prison.

Commutated to three years, one month, fourteen days, minimum, ten years, maximum.

This commutation of sentence is recommended by the district attorney of New York county who wrote under date of November 12, 1915, that the prisoner had rendered valuable aid in testifying

in other cases, and the information which he gave led in some instances to indictments. The district attorney in his communication states that the information furnished to his office by Toblinsky was accurate and valuable, and the results of his disclosures have been far-reaching in their effect, and he further recommended at the time of making his report that the sentence be commuted so that the prisoner might be placed under the jurisdiction of the Parole Board. Since the receipt of that communication a year has elapsed, and in view of the recommendation of the district attorney I have commuted the sentence.

December 20. Anna Michael. Sentenced November 24, 1914; county, New York; crime, grand larceny, first degree: term, five years, minimum, nine years six months, maximum; Auburn Prison.

Committed to two years, one month, minimum, nine years, six months, maximum.

This commutation is granted upon the recommendation of Judge Mulqueen who presided at the trial, who writes as follows:

“I beg to state to your excellency, that I feel convinced that I was too severe in this case. I am convinced that she was not so bad as I then thought. I regret that I did not make the minimum sentence one year. From my re-investigation I have no doubt that if you will reduce the minimum sentence, so that she may be paroled, Miss Pierce and other charitable and excellent people will lead her to live an honest and good life. I trust that you will rectify my mistake and see that she is set free.”

December 23. Thomas Piptone. Sentenced September 9, 1914; county of New York; crime, grand larceny, first degree; term, three years, minimum, six years, maximum: Great Meadow Prison.

Committed to two years, four months, minimum, six years, maximum.

This commutation is granted upon the recommendation of Judge Nott, who writes under date of November 17, 1916, as follows:

“On the 3rd day of May, 1916, I wrote you in reply to an executive communication, the case of Thomas Piptone.

recommending that he should serve the minimum term of the sentence imposed.

“ Since then it has been brought to my attention that the prisoner is now suffering from an open and running wound in the abdomen which very seriously endangers his life. For this reason I am of the opinion that the ends of justice will have been subserved if he were now to receive commutation of sentence. He has served over two years out of the three years imposed as a minimum.

In view of the above recommendation, I have granted the commutation of sentence.

December 23. Chester Allen. Sentenced April 19, 1915; county of Jefferson; crime, burglary, third degree; second offense; term, five years eight months; Auburn Prison.

Commutated to one year, eight months, eight days, minimum, five years, eight months, maximum.

This commutation is granted upon the recommendations of the judge and district attorney of Jefferson county, who under date of May 1, 1916, write as follows:

“ Allen was sentenced on a charge of burglary in the third degree, after a prior conviction of a felony. He is a man with a family and has always taken good care of his family. He has never got in trouble or committed any crime except when under the influence of liquor. The crime for which he was sentenced was not a serious one, but, as he had previously been convicted, the County Court was compelled under the statutes, to impose the maximum punishment of five years. This punishment, in our judgment, is unreasonable and both the court and the district attorney told Allen at the time of the sentence that if his conduct in prison was good, would join in a request for his pardon at the end of a year. The year has expired. We are informed that his conduct has been exemplary and letters received from him during the year indicate a firm and decided purpose to abstain from drink. We think it would be not only wrong but liable to make a confirmed criminal of Allen should he be required to serve longer.”

RESPITES

January 12. Hans Schmidt. Convicted, murder, first degree; county, New York; sentenced February, 1914, to be executed. Conviction affirmed by the Court of Appeals.

Respite granted until week beginning February 14, 1916.

February 2. William Flack. Convicted, murder, first degree; county, New York; sentenced March, 1915, to be executed. Conviction affirmed by the Court of Appeals.

Respite granted until week beginning April 3, 1916.

March 22. Gennaro Maziello or Mazzella. Convicted, murder, first degree; county, Kings; sentenced June, 1915, to be executed. Conviction affirmed by the Court of Appeals.

Respite granted until week beginning June 12, 1916.

May 31. Further respite granted until July 10, 1916.

April 12. Charles F. Stielow. Convicted, murder, first degree; county, Orleans; sentenced July, 1915; to be executed. Conviction affirmed by the Court of Appeals.

Respite granted until week beginning June 12, 1916.

June 12. Further respite granted until July 10, 1916.

July 14. Further respite granted until July 24, 1916.

August 31. Thomas Bambrick. Convicted, murder, first degree; county, New York; sentenced December, 1915, to be executed. Conviction affirmed by the Court of Appeals.

Respite granted until week beginning September 11, 1916.

September 14. Further respite granted until October 2, 1916.

STATE OF NEW YORK

Sixteenth Annual Report

OF THE

COURT OF CLAIMS

OF THE

STATE OF NEW YORK

TRANSMITTED TO THE LEGISLATURE APRIL 4, 1917

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STATE OF NEW YORK

No. 51

IN SENATE

April 4, 1917

**Sixteenth Annual Report of the Court of Claims of the
State of New York**

1916

COURT OF CLAIMS

CLERK'S OFFICE, ALBANY, *April 4, 1917*

HON. EDWARD SCHOENECK, *President of the Senate:*

DEAR SIR.—I have the honor to transmit herewith to you for the Legislature of the State of New York, the sixteenth annual report of the Court of Claims of the State of New York, as required by law.

Very respectfully yours,

FREDERICK D. COLSON,

Clerk.

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JUDGES OF THE COURT OF CLAIMS IN 1916

ADOLPH J. RODENBECK,¹ Presiding Judge, Rochester, N. Y.

FRED M. ACKERSON,² Presiding Judge, Niagara Falls, N. Y.

WILLIAM W. WEBB,³ Judge, Rochester, N. Y.

THOMAS F. FENNELL, Judge, Elmira, N. Y.

CHARLES R. PARIS,⁴ Judge, Hudson Falls, N. Y.

WILLIAM D. CUNNINGHAM,⁵ Judge, Ellenville, N. Y.

¹ On March 3, 1916, Judge Rodenbeck resigned from the Court of Claims by reason of his appointment by the Governor as a supreme court justice in the seventh judicial district.

² Judge Ackerson, who was appointed a judge of the Court of Claims on February 10, 1915, was designated by the Governor on March 6, 1916, as presiding judge to succeed Judge Rodenbeck.

³ Appointed on March 6, 1916, by the Governor to fill the unexpired term of Judge Rodenbeck.

⁴ Appointed on April 19, 1915, by the Governor as an additional judge pursuant to section 282 of the Code of Civil Procedure.

⁵ Appointed on December 29, 1915, by the Governor as an additional judge pursuant to section 282 of the Code of Civil Procedure.

OFFICERS OF THE COURT OF CLAIMS IN 1916

FREDERICK D. COLSON, Clerk, Albany, N. Y.

Deputy Clerks also acting as Court Stenographers

HENRY C. LAMMERT, Brooklyn, N. Y.

WILLIAM R. FOLEY, Brooklyn, N. Y.

RUPERT O. BURROWS,¹ Rochester, N. Y.

LOUIS J. BUDNER,² New York City, N. Y.

LINCOLN L. WATKINS,³ Richford, N. Y.

GEORGE W. MUNSON,⁴ Rochester, N. Y.

¹ Served until May 1, 1916.

² Appointed March 6, 1916.

³ Appointed March 16, 1916.

⁴ Appointed April 24, 1916.

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**OPINIONS OF THE
COURT OF CLAIMS
IN 1916**

OPINIONS OF THE COURT OF CLAIMS IN 1916

THE ADIRONDACK WOOLEN COMPANY *v.* STATE OF NEW YORK

No. 9748

(Dated February 7, 1916)

At What Time Title Vests in the State When Lands Are Appropriated for
Barge Canal Purposes.

The question is, can the State before an award is made or paid to a claimant or agreed upon by the Canal Board decrease its appropriation and thereby relieve itself from damages which it otherwise would be obliged to pay?

The question as to the power of the State to reduce an appropriation at any time before a judgment has been entered or the compensation has actually been paid is an exceedingly important one to the State, and being merely one of statutory construction should be answered favorably to the State unless by express language of the statutes or by a fair implication therefrom title to land appropriated vests at some earlier period.

The statutes preceding the Barge canal act and the decisions made thereunder are uniform in holding that the title did not vest when the State entered upon the land and thereby appropriated it, but rather when the award had been made and recorded or the Statute of Limitations had run against the owners of the property. This unbroken record of statutory enactment and judicial decisions should have great weight in interpreting the Barge canal act upon the subject under discussion in view of the omission from that statute of any express language prescribing when the title shall vest in the State.

The language of the early statutes under which the canals of the State were constructed was not always clear, and has not been uniform upon the question of the interest which the State acquired and when the property appropriated became the property of the State, but the decisions themselves have been uniform in holding that the title did not vest until the money had been paid or the appraisal had been made and recorded or the Statute of Limitations had run.

History of the statutes preceding the Barge canal act of 1903 relating to the appropriation of lands for canal purposes, the procedure under these acts, and the judicial decisions construing them, stated at length.

The Barge canal act is but a step in the development of legislation on the subject of appropriations, and there is nothing in that act which indicates an intention on the part of the State to change the rule which had previously existed for over three-quarters of a century, that the title to the property

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appropriated should not vest in the State until an appraisal had been made and recorded or the Statute of Limitations had run. There are no decisions directly in point, however, for there appears to be no case construing the Barge canal provisions so far as the time of vesting of title in the State is concerned.

The Legislature, of course, may provide for the passing of title in advance of payment if adequate provision is made for such payment and a proper tribunal afforded for determining the compensation; but the general rule is that title does not pass until payment or tender, or until the Statute of Limitations has run.

In construing statutes it is the rule, where there is an opportunity for a difference of opinion as to the proper construction, to adopt that construction, other things being equal, which carries out some general public policy or serves some public interest. Following this rule, it seems a salutary one in the light of what has been said to adopt the construction that under the Barge canal act title does not vest in the State until an appraisement has been made and recorded or paid, that is, until a judgment has been entered in the Court of Claims, or paid, or until the Statute of Limitations has run, or an agreement has been made with the proper officials.

This construction of the Barge canal act will not injure persons to the slightest extent whose property has been appropriated. They are guaranteed just compensation by the Constitution, and whatever the acts of the State, whether they be temporary or permanent in their character, a remedy exists in favor of those who have been injured. If the State has occupied property under a permanent appropriation for which a notice has been served and subsequently releases a part of that property, the owner is clearly entitled to such damages as he sustained during the occupancy. Where the appropriation has been changed, the owner would be entitled to compensation as to a permanent appropriation for the property described in the final appropriation and for such damages as he sustained by reason of the earlier appropriation. Such being the case, it would seem that property owners should assist rather than oppose a construction which the State seeks to place upon the Barge canal statute authorizing it to reduce appropriations subsequent to the service of the notice of appropriation and before judgment has been entered or the compensation paid or the Statute of Limitations has run.

CLAIM against the State of New York for damages to lands caused by the appropriation of the same by the State for Barge canal purposes.

Subsequent to the submission of this case before the former Court of Claims a further appropriation was made by the State reserving in the claimant a certain right of way and the question is presented as to the validity of the action of the State in thus reducing the appropriation and as to the necessity for further proof thereunder.

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The claimant's premises consist of what is known as Moss island at Little Falls, lying between the Mohawk river on the north and the old Erie canal on the south.

West of Moss island, so called, lies Seeley island, from which there is a bridge spanning the Mohawk river to the mainland.

Prior to the appropriation the claimant had access to its property by means of the towpath extending east and west therefrom which it is claimed occupied the site of an old highway.

Two months prior to the original appropriations by the State the claimant acquired a right of way across Seeley island to William street and the bridge above referred to.

A part of the premises of claimant consists of a large quantity of hard rock and three months prior to the appropriation it entered into a contract with certain parties for quarrying the same under which it was to receive a certain price per cubic yard for all stone quarried out and taken away.

It was estimated that there were within the terms of the contract 608,328 cubic yards of rock measured down to the canal level and 960,167 cubic yards of rock taken at the level of the Mohawk river. The total value of this rock was estimated by witnesses for the claimant at from \$208,250 to \$300,000 while the quarry contract itself was estimated to be damaged from \$60,000 to \$87,700.

Under this situation the State on October 27, 1908, appropriated a part of the premises of the claimant including a strip of the rock formation sufficient to enable the State to widen the Erie canal for the purposes of the Barge canal.

The appropriations did not take the claimant's woolen mill property, situated upon the island, but appropriated in addition to the rock above referred to, land over which the claimant had obtained the right of way to William street. The appropriations it is claimed isolated the woolen mill property.

These appropriations were not signed by the State Engineer, who under the statute is authorized subject to certain conditions to enter upon, take possession of and use property for the improved canals, but by the Deputy State Engineer, and it is claimed that the appropriations are for that reason void. This contention of

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the State, however, has been held to be unfounded by the predecessor of the present court, the Board of Claims, and it is not now before this court for determination.

Under these appropriations the claimant insists that aside from the compensation to which it is entitled for the appropriation of rock, it is entitled to a further sum ranging, according to the testimony of its witnesses, from \$88,225 to \$95,500.

The alleged value of the right of way to the claimant may be gathered from the testimony of the witnesses who said that its mill property before the appropriation was worth from \$100,225 to \$108,000 and that afterwards this property was worth but from \$12,000 to \$12,500.

This testimony emphasized the increased expense to the State resulting from the alleged cutting off of the right of way and suggested to the State officials that the appropriations should be modified by reserving to the claimant a right of way over the property appropriated by the State.

It is claimed that the State Engineer and Canal Board are limited in their appropriations by the necessities of the State, that they cannot appropriate more land than the State requires, and that if they appropriated a right of way estimated to be worth many thousands of dollars which is wholly unnecessary it is an excess of authority.

In this situation and before any award was made under the original appropriations the State made new appropriations and thereby reserved to the claimant a right of way from the remaining portion of its property over the land appropriated to and over the existing road from William street to Barge canal lock number seventeen.

These appropriations were designed to provide an outlet for the woolen mill property which had been isolated and thereby reduce the amount of compensation which the State would otherwise be obliged to pay under the original appropriations.

The new appropriations are questioned by the claimant on the ground of the authority of the State to modify the original appropriations by reducing the amount of land or rights taken thereunder.

Opinion by Rodenbeck, P. J.

The question is, can the State before an award is made or paid to a claimant or agreed upon by the Canal Board decrease its appropriation and thereby relieve itself from damages which it otherwise would be obliged to pay?

Nottingham & Nottingham, for claimant.

Egburt E. Woodbury, Attorney-General (Sanford W. Smith, Deputy Attorney-General), for State.

RODENBECK, P. J.—The question as to the power of the State to reduce an appropriation at any time before a judgment has been entered or the compensation has actually been paid is an exceedingly important one to the State and being merely one of statutory construction should be answered favorably to the State unless by express language of the statutes or by a fair implication therefrom title to land appropriated vests at some earlier period.

In this opinion the court is voicing its sentiments as to what the law upon this subject ought to be and is basing its views chiefly upon the consideration that this statute does not expressly prescribe when the title shall vest. The court of course realizes that there is an opportunity for a difference of opinion but feels that with such an opportunity presented the attitude of the court should be favorable to the view that the appropriation may be reduced until a judgment has been entered for the compensation which has been appraised or until the money has been paid especially since the statute is silent upon the subject as to whom the title shall vest in appropriation cases.

The statutes preceding the Barge canal statute and the decisions made thereunder are uniform in holding that the title did not vest when the State entered upon the land and thereby appropriated it but rather when the award had been made and recorded or the Statute of Limitations had run against the owners of the property. And this unbroken record of statutory enactment and judicial decisions should have great weight in inter-

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preting the Barge canal statute upon the subject under discussion in view of the omission from that statute of any express language prescribing when the title shall vest in the State.

The language of the early statutes under which the canals of the State were constructed was not always clear and has not been uniform upon the question of the interest which the State acquires and when the property appropriated became the property of the State but the decisions themselves have been uniform in holding that the title did not vest until the money had been paid or the appraisal had been made and recorded or the Statute of Limitations had run.

Under the early statutes there was little formality connected with appropriations. The proper officer merely took possession leaving the owner to his recourse for the appointment of appraisers by application to the courts. There was also a short Statute of Limitations of one year which ran against him if he did not take steps to have his property appraised. This was not an unusual procedure for at that time the construction of the inland waterways of the State was a new project and it was believed that it would add wonderfully to the value of property through which it was constructed and to the resources of the State. With this idea in mind the statute of 1816 (chap. 237) proceeded upon the assumption that the people who owned the property that was required for the canals would voluntarily make such grants as were necessary. But this was found to be an erroneous assumption and by the statute of 1817 (chap. 262) provision was made for the appropriation of the necessary land *in invitum*. It was under the latter statute and subsequent statutes that it was provided that the State might enter upon and take possession of such property as was necessary and relegate the owner to recourse to the courts for the appointment of appraisers vesting title in the State within a year after the appropriation if an appraisal was not applied for and made. It was provided in the latter statute that if the claim was not prosecuted within the time prescribed the owner should lose all interest in the property but that if such an application was made "the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of

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the premises, so appropriated, shall be vested in the people of this state." § 3.

From these earlier statutes it will be observed that no maps were required to be made as a preliminary to an appropriation but that the mere occupancy and possession by the State constituted the appropriation and gave the State full control over the property vesting the title in it after the lapse of a year if no appraisal was made and if an appraisal was had when the damages shall have been assessed and appraised. The latter conclusion is based upon the force to be given to the words "so appropriated" contained in the provision above quoted from the statute of 1817, which provides that the fee simple shall be vested in the people of the premises "so appropriated," referring to the requirement that the commissioners shall pay the damages "so to be assessed and appraised."

It is obvious that with such a procedure the exact amount of land which the State had appropriated might be seriously in doubt in those cases where there had been no appraisal and so the State later provided that maps should be made of the canals of the State and that when these maps had been made as required by the statute the lands inclosed by the lines on the maps as indicating the property of the State should create a presumption of ownership in the State. These maps are usually referred to as the Holmes-Hutchinson maps of 1834 and are the main reliance of the State in establishing its ownership to much of the canal lands of the State. Subsequent general maps were made, known usually as the canal maps of 1874, but they do not seem to have complied with the requirements of the statute with reference to authentication so as to give them the force as evidence which attaches to the maps of 1834.

The provisions of these statutes of 1816 and 1817 and any amendments thereto were carried into the Revised Statutes which like previous statutes provided for an appraisement of the property at the option of the property owners, such appraisement to be made by commissioners to be appointed upon application to the courts. The same informality with reference to the manner

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of making the appropriation was continued and no further requirement was inserted with reference to the making of maps of specific property appropriated. The short Statute of Limitations was also continued. Under the Revised Statutes it will be seen that the theory was that the appropriation consisted in entering upon the property leaving the property owner to seek compensation by application to the courts for an appraisement. If there is any doubt with respect to the meaning of the language in prior statutes with reference to the vesting of title it is cleared by the language of the Revised Statutes which provides that "the fee simple of all premises so appropriated, in relation to which, such estimate and appraisement shall have been made and recorded, shall be vested in the people of this state." R. S. 1829, pt. I, chap. 9, tit. 9, art. 3, § 52. This language is very plain that the fee simple does not attach until the estimate and appraisement has been "made and recorded" and this is the construction which the courts have placed upon the language. *Brinckerhoff v. Wemple* (1828), 1 Wend. 470; *Baker v. Johnson* (1842), 2 Hill, 342; *Rexford v. Knight* (1854), 11 N. Y. 308; *Ballou v. Ballou* (1879), 78 id. 325.

The views of the courts upon the statutes heretofore referred to are clearly expressed in the following quotations from the *Rexford* and *Ballou* cases:

"The construction of those acts (1817 and 1819) has been, that the fee did not vest in the state, until the payment of the compensation, although the authority to enter upon and appropriate the land was complete prior to payment." *Rexford v. Knight*, 11 N. Y. 314.

"The owner of land has a right to prefer a claim for damages as soon as the land is taken possession of by the state, but the title does not vest in the state until the amount of damages becomes fixed by appraisement. When the damages are thus ascertained the title passes, the presumption being that the state will pay the amount upon demand. The statute settles the point. It provides that 'the fee simple of all premises so appropriated in relation to which such estimate and appraisements, shall have

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been made, and recorded, shall be vested in the people of this state.' ” *Ballou v. Ballou*, 78 N. Y. 327.

The uncertainty and unfairness of appropriating property by merely taking possession without a notice of the extent of the appropriation began to be felt and the courts postponed the operation of the short Statute of Limitations where the exact boundaries of the property appropriated were not known and finally the State added to the formalities necessary to make a valid appropriation by providing that a notice should be served upon the owners or occupant containing a description of the property taken. Laws of 1884, chap. 336. This and similar statutes along this line have no significance upon the question under consideration except to emphasize what will be later contended that the mere requirement as to the making and filing of a map and the giving of notice was intended solely to give definiteness to the appropriation and not to prescribe the time when title shall vest in the State. The fact that a map is to be made and filed or that it is to be served upon the owner of the property or filed does not because of its formality change the general rule as to vesting of title.

The last of these general statutes relating to the construction of the canals is the Canal Law of 1894 subsequently re-enacted which revised in one statute the various provisions relating to the canals of the State. Following the trend of the statutes with respect to greater formality with reference to appropriations the Canal Law provided in addition to taking possession and making maps that a notice should be served upon the property owner that his land had been appropriated but it did not change the rule which had prevailed theretofore as to the vesting of title. The additional requirement that a notice should be served on the property owner did not alter the rule as to change of title from the owner to the State any more than did the requirement in prior statutes that a map should be made and filed of the appropriated land. On the contrary the Canal Law provided that “The title to all real property permanently appropriated for the use of the canals of the state shall be

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vested in the people of this state" (§ 83), but it did not in express language indicate when the title should vest, leaving the courts to follow the rule previously enunciated that the title would not vest until the compensation had been appraised and recorded which might, under later statutes, be said to be when the judgment had been entered.

But we are concerned here with the provisions of the Barge Canal Act, a special statute applicable only to the Barge canal and designed for the construction of that improvement. Where its provisions are complete they would undoubtedly supersede the provisions of any other statute upon the same subject. The provisions in the Barge Canal Act are complete so far as the manner of making appropriations for Barge canal purposes are concerned and, therefore, it is a fair conclusion that in determining the question which we now have before us we must have recourse to the provisions of the Barge Canal Act rather than to those of the Canal Law and the decisions which may have been made under the latter statute.

Looking at the Barge canal statute it will be seen that its provisions are a substantial continuation of existing provisions relating to appropriations as those provisions are contained in the Canal Law. They have been modified it is true, but like prior statutes the Barge Canal Act is but a step in the development of legislation on the subject of appropriations and there is nothing in the act which indicates an intention on the part of the State to change the rule which had previously existed for over three-quarters of a century that the title to the property appropriated should not vest in the State until an appraisal had been made and recorded or the Statute of Limitations had run. There are no decisions directly in point, however, for there appears to be no case construing the Barge canal provisions so far as the time of vesting of title in the State is concerned.

Under the provisions of the Barge canal statute as originally enacted the State Engineer and Surveyor was authorized to enter upon and take possession of property and thereafter maps were to be made and filed and notices were to be served upon the property owners. Under the statute as originally enacted it is quite

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likely that the right of possession of the State was complete when the State Engineer and Surveyor entered upon and took possession of the property and that the subsequent requirements were merely designed to give the owner a notice of the amount of the property which had been appropriated by the act of the State Engineer and Surveyor. The statute as first drawn followed closely, it will be seen, the language of previous statutes which regarded the act of the State in entering upon the property and taking possession of it as an appropriation of the property.

Experience, however, taught the State the necessity of restricting the powers of the State Engineer and Surveyor and in order to avoid an abuse of the discretion vested in him with reference to taking possession of property an amendment of the original statute provided that this right should be restricted and there was inserted the limitation that he should have the right to enter upon and take possession of property subject to certain conditions, which conditions were that the appropriation should be approved by the Canal Board in addition to the further and previously existing requirements that a map should be made and notice should be given to the property owner.

The unlimited power of the State Engineer and Surveyor to enter upon and take possession of property was thereby restricted, but it was not the design of this statute by its original language or by the additional precautions inserted by the amendment requiring greater formalities with respect to appropriations that they should when completed necessarily vest the title in the State. The rule with respect to the vesting of title had not been changed by increasing the formalities with respect to the procedure for appropriating property.

It is true that the statute provides that from the time of the service of the notice the entry upon and appropriation by the State shall be deemed complete and that the notice shall be conclusive evidence of the entry and appropriation but this language offers nothing new with respect to the time when the title vests in the State. So many formalities were required with respect to the appropriations that it was deemed necessary to provide at what time the appropriation should be complete and

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so the statute prescribed that that event shall take place when the notice is served rather than at any prior stage of the acts of appropriation.

There are many authorities illustrating the conclusion that the term "appropriation" is not necessarily used as signifying the time when the title passes. *Kennedy v. Indianapolis*, 103 U. S. 599; *Matter of Mayor*, 40 App. Div. 281; 15 Cyc. 720, 758. There is, therefore, no express language in the Barge Canal Act which prescribes when the title shall vest in the State and there is nothing in the Canal Law, if that statute applies, which lends any assistance in determining the question. Nothing is to be inferred from the greater formalities required in making appropriations under the Barge canal statute and the word "complete" should not be extended beyond what it was intended to signify, that is, when the act of appropriation was complete.

In view of the use of this term and the restrictions by the amendment to the Barge canal statute of the power of the State Engineer and Surveyor to enter upon and take possession of property it may well be that the right to actually occupy property dates from the service of the notice of appropriation in which case interest runs from that date upon any award made or compensation allowed to the property owner.

This view that the title does not pass by the mere act of appropriation as a general proposition is well expressed in *Commissioners of Washington Park*, 56 N. Y. 144, which reviews the English and American cases on this subject and holds that the taking of the preliminary steps in condemnation proceedings, such as a vote of the park commissioners to take certain land, the filing of maps thereof or the appointment of commissioners of appraisal does not operate to pass the title but that the title vests only on the confirmation of the appraiser's report and the payment or deposit of the compensation.

Nor is there any thing in *People v. Adirondack Railway Company*, 160 N. Y. 225, at variance with the views expressed since in the statute there under review in addition to what is contained in the Barge canal statute there is the language which provides that from the time of the appropriation "such property shall be

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deemed and be the property of the state." This is very significant language and were it contained in the Barge canal statute it would compel a holding that the service of the notice of appropriation not only completed the appropriation but made the land thus appropriated the property of the State and vested the title in the State.

In view of the history of legislation upon the subject of appropriations by the State, as we have thus far outlined it, and especially in view of the failure of the Barge canal statute to prescribe in express language when title shall vest in the State, it seems reasonable and controlling that the general rule which has been formulated by the courts during nearly a century of the State's history covering the period of the construction of the canals of the State should be followed.

As we have seen above, under the statutes preceding the Barge Canal Act, title did not vest in the State until an appraisal had been made and recorded. We have also seen that under other statutes, where there was an absence of express language, the courts have held that a property owner was entitled to a definite judgment as to his compensation and an opportunity for the enforcement of the judgment before the title to the property would pass out of him. In the absence of express language in the Barge Canal Act, requiring a different holding, these rules, which may be said to be general principles underlying the condemnation of property in this State, should be the guide for interpreting the statute under consideration.

The Legislature, of course, may provide for the passing of title in advance of payment if adequate provision is made for such payment and a proper tribunal afforded for determining the compensation; but the general rule is that title does not pass until payment or tender, or until the Statute of Limitations has run. 15 Cyc. 577, 578, 785; *Benedict v. City of New York*, 98 Fed. Rep. 789; *People v. Adirondack Railway Co.*, 160 N. Y. 225; *People v. Tompkins*, 40 Hun, 228; *Sweet v. Rechel*, 159 U. S. 380; *Zimmerman v. Kansas City N. W. Railway Co.*, 144 Fed. Rep. 622; *Cherokee Nation v. Kansas Railway Co.*, 135 U. S.

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641; B. & S. R. R. Co. v. Nesbit, 10 How. (U. S.) 395; Kennedy v. Indianapolis, 103 U. S. 599.

In the last case cited which involved a statute providing for the building of a canal by the State, which statute was quite similar to our canal statutes, the court said: "It seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him." Page 603.

In 15 Cyc. 785, 786, it is said: "Under constitutions which contain no express requirement that payment shall precede taking but prohibit the taking of private property for public use without just compensation, title does not pass before payment, except where the statute expressly provides that title shall pass before compensation and makes adequate and certain provision for such compensation."

In *People v. Adirondack Railway Co.*, 25 Misc. Rep. 88, the court said: "Under the condemnation proceedings taken by the railway company the title of the land sought to be taken does not pass upon the procuring of a judgment of condemnation, nor does it pass until the amount of compensation has been determined and actually paid to the owners. Code Civ. Pro. §§ 3371, 3373."

In construing statutes it is the rule, where there is an opportunity for a difference of opinion as to the proper construction, to adopt that construction, other things being equal, which carries out some general public policy or serves some public interest. Following this rule, it seems a salutary one in the light of what has been said to adopt the construction that title does not vest in the State until an appraisement has been made and recorded or paid, that is, until a judgment has been entered in the Court of Claims, or paid, or until the Statute of Limitations has run, or an agreement has been made with the proper officials.

One of the main advantages to be derived from such a construction is, that it will enable the State to reduce an appropria-

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tion before the judgment has been entered or the money paid, where a mistake has been made in describing the appropriation or an excess appropriation has been made which is useless for the purposes of the canal. Under the construction that the title vests when the appropriation is served even a technical error, which may affect the amount of property taken, cannot be corrected, and certainly an excess appropriation of land or water rights cannot be reduced. There are many cases where excess appropriations have been made and where the State, unless the construction here contended for prevails, will be obliged to pay for property for which it has no use. In some instances appropriations have been made of land without realizing that they carried with them riparian rights attached to the land, and under the construction that the title vests when the notice is served the State cannot divest itself of these excess riparian rights. Likewise where appropriations of land have been made and property has been isolated, due to failure to reserve a right of way over the appropriated land, the State is helpless, unless the contention here made is sustained, and cannot change the appropriation by legally reserving in the owner a right of way over the appropriated land to the isolated land. These instances, briefly recited as they have been, would make a most decisive impression if the enormous amounts involved could be stated and the damages due to isolating land, which the State has no use for, could be enumerated. It may be seriously questioned whether the recent bond issue provided for the completion of the Barge canal will be sufficient for that purpose unless the State is permitted to relieve itself so far as possible of excess appropriations which are not needed for the canals and which cannot be used for purposes of public income.

The position here urged is designed to place the State in the same position with respect to the discontinuance of proceedings or the reduction of appropriations that is common to public service corporations and municipalities of the State. The General Condemnation Law provides that proceedings taken under that act may be abandoned at any time within thirty days after the entry of the final order and that there may be a renewal of the proceedings upon terms. Code Civ. Pro. § 3374. The charter

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of Greater New York permits that city to fix the time when the fee shall attach. § 1439. And the general rule is, that condemnation proceedings may be discontinued at any time before title passes. *Benedict v. City of New York*, 98 Fed. Rep. 789; *Commissioners of Washington Park*, 56 N. Y. 144; *B. & S. R. R. Co. v. Nesbit*, 10 How. (U. S.) 395. Such being what might be called the general policy of the State founded upon sound reason and public interest, why should a different rule be applied to the State binding it with an iron band to appropriations described in the notice of appropriation, in the absence of any language that by that act the property changes hands and becomes vested in the State.

But an additional reason in support of the conclusion arrived at is found in the fact that this result will not injure persons to the slightest extent whose property has been appropriated. They are guaranteed just compensation by the Constitution, and whatever the acts of the State, whether they be temporary or permanent in their character, a remedy exists in favor of those who have been injured. If the State has occupied property under a permanent appropriation for which a notice has been served and subsequently releases a part of that property, the owner is clearly entitled to such damages as he sustained during the occupancy. Where the appropriation has been changed, the owner would be entitled to compensation as to a permanent appropriation for the property described in the final appropriation and for such damages as he sustained by reason of the earlier appropriation. Such being the case, it would seem that property owners should assist rather than oppose the construction which the State seeks to place upon the Barge canal statute authorizing it to reduce appropriations subsequent to the service of the notice of appropriation and before judgment has been entered or the compensation paid or the Statute of Limitations has run.

The provisions of chapter 244 of the Laws of 1909 do not militate against the view that the State may reduce an appropriation before the compensation is awarded or paid. Some statute was necessary in order to confer authority upon State officers to exe-

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cute a reconveyance after an appropriation had been made, an award determined, the compensation paid and the fee vested. There is nothing in the statute which indicates an intention on the part of the Legislature that the State may not change its appropriation at any time before the transaction has been completed by the making of an award or the payment of the compensation.

The court, therefore, holds that the appropriation made by the State on or about December 9, 1913, under maps Nos. 928-c, 953-a and 954-b are valid appropriations and that further proof should be submitted to enable the court to determine the compensation to which claimant is entitled under these and the former appropriations.

It seems appropriate at this time to indicate to claimant the attitude of the court with respect to the claims made by the parties with whom it has made a contract for quarrying stone from its property. This court has jurisdiction to hear and determine claims against the State only. It has no authority to determine disputes between individuals for which regular courts have been provided. Except in extraordinary cases where the amounts involved are small, this court is unwilling to exceed its authority even where all the parties consent thereto. In this claim the court will not make a separate award to those parties having the quarrying contract but will make one award and leave it to the parties to adjust the award between them according to their respective rights.

In view of the delay that has occurred in connection with the disposition of this claim the court will grant a preference in the submission of further proof and permit claimant at any time and at any term to present such further proofs as may be necessary to put the claim in a condition for final award.

Ackerson, Fennell and Paris, JJ., concur.

Ordered accordingly.

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FRANK DEBOTTIS v. STATE OF NEW YORK

No. 10564

(Dated February 8, 1916)

Claim for Damages for Personal Injuries.

Claimant alleged that while crossing a highway bridge over the canal he stubbed his toe against one of the bridge planks, lost his balance and fell from the bridge to the canal towpath at a point where there was no guard rail along the side of the bridge. The State contended that claimant was not on the bridge when the accident happened, but had left the bridge and started down the stone steps leading to the towpath.

The evidence on the cause of the fall was in direct conflict. From a consideration of the evidence the Court held that the claimant was walking down the stone steps when he tripped and fell and that there was no negligence on the part of the State which caused his original injury.

In addition, the Court found from the evidence that the injuries consequent upon the fall resulted from claimant's failure to take the steps and precautions recommended by his attending physician, and therefore should not be charged against the State.

CLAIM against the State of New York for damages for personal injuries.

Thompson, Woods & Woods, for claimant.

Egburt E. Woodbury, Attorney-General (George L. Meade, Deputy Attorney-General) for State.

FENNELL, J.— This accident happened February 1, 1911, at about 7:30 P. M. at a canal bridge near Port Byron.

Claimant contends that he was passing northerly across the highway bridge over the canal when he stubbed his toe against a piece of plank laid lengthwise of the bridge and on top of and across the ends of the regular roadway planks of the bridge; that when he stubbed his toe he pitched forward and to the left; that before he could recover his balance he fell over the edge of the bridge to the canal towpath; that there was no guard rail along the

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side of the bridge where the claimant fell and that the State should have provided such a guard rail.

The State contends that claimant left the bridge and started down the stone steps leading to the towpath which steps were formed by the ends of the courses of stone that form the abutment of the bridge.

The fall caused a compound comminuted fracture of the right leg below the knee. Subsequent infection caused ankylosed condition of the knee joint. The bones below the knee are badly out of place. The front and side of the leg below the knee have very large and very ugly scars. Claimant is undoubtedly a cripple for life. His condition is peculiarly distressing in that he is a market gardener engaged in raising garden truck, which his sons take to market, and the ankylosed knee makes it impossible for him to kneel down and weed, cultivate and care for the young seedlings and plants. He is sixty years of age.

There are two serious questions in this case. How did claimant fall? Is his present very serious condition due to the injuries sustained in the fall and their natural consequences or to his failure to take proper care of himself after the injury?

The evidence on the cause of the fall is in direct conflict. It cannot be harmonized in any way. Edward Haley, then and now a State employee, testified that he went to the home of the claimant after the accident and took claimant in an auto to the scene of the accident; that claimant showed him where he fell; that the spot was four or five steps down from the top of the stone steps. Alonzo Beach, now a State employee, testified that he drove Haley to claimant's house in an auto; that he heard claimant say he fell going down the bridge steps; that he drove Haley and claimant to the bridge and claimant pointed out the place where he fell; that the place was three or four or maybe the next step down; that he stated he tripped there and fell.

A natural sympathy for one so seriously crippled warrants an extra careful scrutiny of the State's evidence. If these two men were bridge tenders and the accident happened because of their alleged carelessness or negligence then their evidence, given to protect themselves and their positions, might well be seriously

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questioned. Here there was no such condition. They had nothing to do with this bridge and were not responsible for it or the use of it.

Claimant marked with an "X" on a photograph the spot on the bridge where he stated he stubbed his toe. It was just where the end truss enters the floor of the bridge. Carl T. Holsteiner, a civil engineer, testified that the north end of the truss entered the bridge floor one and seven-tenths feet from the wall of the abutment. Claimant was walking toward the abutment when he stubbed his toe. Claimant states he struck about one foot from the water's edge of the canal and crawled to the foot of the steps. The civil engineer's testimony shows that the water's edge is fourteen and six-tenths feet from the abutment. Claimant was found at the foot of the steps.

George Elliott was sworn for the claimant on his case in chief and testified to helping to pick up claimant and to the extent of his injuries as he saw them at the time. Elliott was also sworn in rebuttal and then stated that after taking Debottis away he went back with a lantern to the place of the accident and found a pool of blood under the line of the side of the bridge, six or seven feet from the face of the abutment and six or seven feet east from the third or fourth step. Claimant also swore on rebuttal that he could not tell where he landed on the towpath. The "X" mark, made by claimant on the photograph, shows he stubbed his toe while walking toward the abutment at a point one and seven-tenths feet from the abutment. If he fell at the point claimed the pool of blood should have been very close to the face of the abutment. If he fell where Elliott testified he saw the pool of blood then he must have fallen over the end truss composed of two parallel members, which rises at an angle of two and eight-tenths feet in seven feet.

Claimant was on his way home. To reach his home he could have gone directly ahead along the roadway, followed the bend of the road to the left and then some distance to a canal lock, whence he could come back up the towpath a short distance to his house. He could also get home by going down the stone steps at the side of the bridge and passing along the towpath to his house.

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I am forced to the conclusion that claimant was walking down the stone steps when he tripped and fell.

Dr. Stuart, who attended claimant, testified that there was no chance to give aseptic dressing at the home of claimant and the result was abscesses, suppuration of upper and lower leg and general systematic poisoning. On cross-examination he testified that the infection was caused by claimant's habits of life and surroundings; that the ankylosed condition of the knee was due to the results following the infection which came largely through his surroundings; that he had recommended that claimant go to a hospital for treatment. Claimant stated that he did not have the money to go to a hospital. There are provisions made for surgical cases in hospitals even when patients are indigent. The ankylosed condition of the knee which resulted from claimant's failure to take the steps and precautions recommended by his attending physician should not be charged against the State of New York.

The physical condition of the claimant is pitiable and excites sympathy but there seems to be no negligence on the part of the State which caused his original injury.

Claim dismissed.

CITY OF NEW YORK v. STATE OF NEW YORK

No. 2473-A

(Dated February 14, 1916)

Claim for Certain Interest on Excise Moneys Deposited in New York City Banks.

The Liquor Tax Law provides that the special deputy commissioner shall deposit excise moneys in a bank or other depository in a separate account in his official name entitled "Liquor Tax Moneys". It further provides that one-half of the revenue resulting from taxes, fines and penalties under the provisions of the Liquor Tax Law shall be paid by the special deputy commissioner within ten days from the receipt thereof to the treasurer of the State of New York, and the remaining one-half to the town or city in which

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the traffic was carried on from which the revenues were received. The statute further provides that the interest accruing on this account until its apportionment by the special deputy commissioner shall belong to the State and that any interest accumulating after its apportionment shall belong to the State and the locality in equal shares.

The scheme of the statute seems to be that while the moneys are unapportioned the State shall be entitled to the accrued interest on the undivided funds. The Excise Commissioner is not required to wait ten days before the distribution of the money but may distribute it at any time within the ten days or may deposit the moneys in separate accounts. Where the deposit is so made, the State and the city are each entitled to the interest which accumulates on its account. In two instances the Excise Commissioner opened separate accounts and in these cases the State should remit the interest which was paid to it by the bank on the account opened in the name of the city. This interest amounts to the sum of \$280.68 for which the city of New York is entitled to an award with interest thereon from the date of its receipt by the State.

CLAIM against the State of New York for certain interest on excise moneys deposited in New York city banks.

Joseph A. Stover, Assistant Corporation Counsel, for claimant.

Egburt E. Woodbury, Attorney-General (James S. Y. Ivins, Deputy Attorney-General), for State.

RODENBECK, P. J.— This is a claim for \$6,025, being the amount of interest accumulated on liquor tax moneys deposited in banks in the city of New York by the special deputy commissioner of excise. By virtue of the fact that the city of New York is entitled to one-half of the excise moneys it claims also to be entitled to one-half of the interest which accumulated upon the funds deposited in the banks of the city by the special deputy excise commissioner.

This position of the city of New York is not tenable. The Liquor Tax Law provides that the special deputy commissioner shall deposit excise moneys in a bank or other depository in a separate account in his official name entitled "Liquor Tax Moneys." It was the intention of the statute that a single account in the bank should be kept until the moneys are divided. Liquor Tax Law, § 12, subd. 17. It further provides that one-half of the

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revenues resulting from taxes, fines and penalties under the provisions of the Liquor Tax Law shall be paid by the special deputy commissioner within ten days from the receipt thereof to the treasurer of the State of New York and the remaining one-half to the town or city in which the traffic was carried on from which the revenues were received. Id. § 10. The statute therefore provides for a single account and that the moneys in the account shall be distributed within ten days from the receipt thereof. The statute further provides that the interest accruing on this account until its apportionment by the special deputy commissioner of excise shall belong to the State and that any interest accumulating after its apportionment shall belong to the State and the locality in equal shares. Id. § 12, subd. 17. The statute uses the words "undivided" and "apportioned" with obvious distinction. The moneys in the bank may be undivided and unapportioned. They may be undivided and apportioned and they may be divided and apportioned. While the moneys of the State and the city are in a single account they are undivided. When the Excise Commissioner draws his check for the share to which the State and the city are entitled in this undivided fund, the fund is apportioned but still undivided and when the checks are presented and paid the fund is divided and apportioned. While the fund is undivided the State is entitled to the accumulated interest. After its apportionment by the Excise Commissioner and before payment each is entitled to one-half of the interest on the undivided fund, that is, there may be an accumulation of interest upon this undivided fund after its apportionment by the excise officer and this accrued interest on the undivided fund is to be equally distributed to the city and the State. Id. § 12, subd. 17. The power of the Legislature to make this distribution of accrued interest cannot be questioned any more than its authority to distribute one-half of the moneys to the city and one-half to the State. The cases which sustain the constitutionality of the distribution of the moneys are also an authority for the constitutionality of the distribution of the accrued interest. Where the Excise Commissioner does not distribute the money within ten days the city may compel him to do so but where it is not done the accrued interest until the fund is

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apportioned belongs to the State. The statute so provides. It says that "all interest accruing on undivided excise moneys deposited by any * * * special deputy commissioner of excise and all interest accruing on the part thereof apportioned to the state shall belong to the state of New York." Id. § 12, subd. 17. It is true that the statute says that "all interest moneys accruing on the part thereof belonging to the localities, etc.," shall belong to the city, but the word "belonging" evidently means apportioned. The scheme of the statute seems to be that while the moneys are unapportioned the State shall be entitled to the accrued interest on the undivided funds. The Excise Commissioner is not required to wait ten days before the distribution of the money but may distribute it at any time within the ten days or may deposit the moneys in separate accounts. Where the deposit is so made the State and the city are each entitled to the interest which accumulates on its account. In two instances the Excise Commissioner opened separate accounts and in these cases the State should remit the interest which was paid to it by the bank on the account opened in the name of the city. This interest amounts to the sum of \$280.68 for which the city of New York is entitled to an award with interest thereon from the date of its receipt by the State.*

Fennell, J., concurs. _____

FRED R. BUTTERFIELD v. STATE OF NEW YORK

No. 940-A

(Dated February 18, 1916)

Service of Notice of Intention Is Jurisdictional and Cannot Be Waived —
Term "Appropriation" Not Applicable to Flood Claim.

The claimant owned lands in the Town of Kingsbury, County of Washington, and sought to recover against the State for the flooding of said lands

* Upon appeal by the claimant to the Appellate Division, 3rd Department, the judgment of the Court of Claims was reversed and the matter remitted to the Court of Claims for further action (175 App. Div. 252). The opinion of the Appellate Division will be found in this volume at page 315.

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owing to the construction of a permanent improvement on Wood Creek along which the lands are located. Claimant however failed to file the notice of intention, which is required by Section 264 of the Code of Civil Procedure in claims other than for the appropriation of land, and contended that no such notice was required because the alleged damage was due to the permanent improvement made by the State in constructing a dam which interfered with the free flow of water in the creek and caused the flooding. The Court's attention however was not called on the trial to the fact that no notice of intention had been filed.

The Court held that the service of the notice of intention is jurisdictional and cannot be waived. The jurisdiction of the Court of Claims to hear any claim rests upon statute and in this instance the statute says that no claim shall be "maintained" against the State unless such a notice has been filed. This language goes to the very right of the claimant to maintain the action and unless the notice is filed the Court has no jurisdiction to entertain the claim, irrespective of any question as to whether or not the attention of the Court was called to the failure to file it.

Jurisdiction cannot be conferred by the mere omission of the Attorney-General's office to make the objection on the trial. It is the duty of the claimant to show on the trial that everything necessary to confer jurisdiction has been done. In this case, before a decision had been made, the Court's attention was called directly to the fact that no notice of intention had been filed. The Court having actual knowledge that an act necessary to confer jurisdiction had been omitted, cannot go into the merits, but must dismiss the claim.

The word "appropriation" has a varying meaning but it cannot be interpreted to include a case of temporary or occasional flooding arising from an improvement constructed on a stream below the point of flooding. The exception of cases where the State has made an appropriation of land is due to the fact that the appropriation is the act of the State itself; it has full knowledge of the facts, and therefore no notice of intention is necessary.

CLAIM against the State of New York for the flooding of claimant's land in the town of Kingsbury, Washington county.

W. E. Young, for claimant.

Egburt E. Woodbury, Attorney-General (Joseph P. Coughlin and Edmund H. Lewis, Deputy Attorneys-General), for State.

RODENBECK, P. J.— This is a claim for the flooding of claimant's land in the town of Kingsbury, county of Washington, due, it is claimed, to certain defects in the construction of an improvement on Wood creek, upon which claimant's premises are situated.

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The claimant did not file a notice of intention to commence the action as required by section 264 of the Code of Civil Procedure and the only answer thereto is that the statute does not apply because the flooding, it is claimed, was due to the permanent improvement made by the State some distance below the premises in the bed of Wood creek in the nature of the construction of a dam which it is alleged obstructed the free flow of the water of the creek and assisted in causing the flooding and damage.

The statute provides that "No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths. The attorney-general may require any person filing such a notice of claim for any cause whatever against the state to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant's residence, relating to such claim, and when so sworn, to answer orally as to any facts relative to the justness of such claim." Code Civ. Pro. § 264.

It is obvious from this language that if it applies to the present claim the claim must be dismissed. The courts have repeatedly held that the filing of such notice is a condition precedent to the maintenance of an action and must not only be alleged but proved upon the trial. *Curry v. City of Buffalo*, 135 N. Y. 366; *Foley v. Mayor*, 1 App. Div. 586; *White v. Mayor*, 15 id. 440; *Misano v. Mayor*, 17 id. 536; *Sheehy v. City of New York*, 29 id. 263; *Krall v. City of New York*, 44 id. 259; *Smith v. City of New York*, 88 id. 606.

It is contended, however, that the words "appropriation of land" apply to a claim like the present one. This contention is erroneous. The word "appropriation" has a varying meaning but it cannot be interpreted to include a case of temporary or

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occasional flooding arising from an improvement constructed on a stream below the point of flooding. The exception of cases where the State has made an appropriation of land is due to the fact that the appropriation is the act of the State itself and it has full knowledge of the facts. The occasional indirect effects of such appropriation some distance away from the improvement can hardly be said to be within the knowledge of the State and to come within the language of the exception. The word "appropriation," however, has never been extended to include a case like the one under consideration. Webster defines it as "the act of setting apart or assigning to a particular use or person in exclusion of all others." The peculiar significance of the word is that of allotting, assigning or setting apart for some specific purpose; to make a thing one's own; to make it the subject of property; to exercise dominion over it for one's own purpose; the taking from another to one's self of a thing with or without violence. See Words & Phrases; *Filor v. U. S.*, 9 Wall. 45. There is no meaning attaching to the word "appropriation" which can be said to include the present claim.

The service of a notice of intention is jurisdictional and cannot be waived. It has a peculiar force in connection with a claim against the State. The jurisdiction of this court to hear any claim rests upon statute, and in this instance the statute says that no claim shall be "maintained" against the State unless such a notice has been filed. This language goes to the very right of the claimant to maintain the action and unless the notice is filed the court has no jurisdiction to entertain the claim, irrespective of any question as to whether the attention of the court was called to the failure to file a notice of intention.

This is not a technical objection to the maintenance of the claim. The purpose of the statute was to give the State, through the Attorney-General, timely notice of the proposed filing of the claim so that it might be investigated and so that he might require the person filing the claim to be sworn before him or one of his deputies designated by him for the purpose of investigating the facts relating to the claim. Unless the notice of intention is filed

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with the Attorney-General, that officer has no notice of the proposed filing of the claim and no opportunity is afforded him to investigate the claim and protect the State against unjust and baseless claims.

The claim should, therefore, be dismissed.*

PARIS, J. (concurring).— This claim is for damages to crops of claimant, alleged to have been sustained by reason of the same having been flooded with water overflowing the banks of Wood creek, in the town of Kingsbury, Washington county, N. Y., claimant alleging that such overflow was caused by a dam built by the State of New York across Wood creek to a height above the natural flow of said creek.

Section 264 of the Code of Civil Procedure provides as follows: “ No claim other than for the appropriation of land shall be maintained against the state, unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths. The attorney-general may require any person filing such a notice of claim for any cause whatever against the state to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant’s residence, relating to such claim, and when so sworn, to answer orally as to any facts relative to the justness of such claim. Willful false swearing before the attorney-general or deputy attorney-general is perjury and punishable as such.”

No notice of intention to file this claim was filed either in the office of the clerk of the Board of Claims or with the Attorney-General, and no contention is made that the claim is founded upon the appropriation of land.

The contention of the claimant is, that the claim was filed

* See footnote on page 30.

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within six months after the damages accrued, and that, therefore, no notice of the intention to file the claim was necessary.

My attention has not been called to any court decision under this section of the Code and I have been unable to find any, but this provision is analogous to the provisions of section 341 of the Village Law, under which decisions have been made. Under this section it has been held that the provisions of the section requiring a written and verified statement of the nature of the claim, etc., to be filed with the village clerk within sixty days after the cause of action has accrued, constitute a condition precedent, compliance with which must be pleaded and proved. See *Thrall v. Cuba Village*, 88 App. Div. 410.

The contention of the claimant that the filing of the claim within the period prescribed for the filing of notice of intention, takes the place of the notice of intention, seems to be met by the decision in *Cotriss v. Village of Medina*, 139 App. Div. 875.

If the claim is to take the place of the notice of intention, it would seem that it must be filed with the Attorney-General. There is nothing before this court in this matter to indicate that anything further was done than to file the claim under the rules with the clerk.

The claimant further contends that the State waived its rights under this section by not raising the point directly on the trial of the claim, and cites in support of his theory *McCarthy v. Far Rockaway*, 3 App. Div. 379.

If the provision of the statute in question is jurisdictional, I do not believe it can be waived and jurisdiction conferred by the mere omission of the Attorney-General's office to make that objection on the trial. It seems to me that it is the duty of the claimant to show on the trial that everything necessary to confer jurisdiction has been done. In this case, before a decision had been made, the court's attention was called directly to the fact that no notice of intention had been filed as prescribed by law.

The court having actual knowledge that an act necessary to

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confer jurisdiction had been omitted, cannot go into the merits, but must dismiss the claim.

Claim dismissed.*

NED C. RYDER and HARRIET R. PHARIS v. STATE OF NEW YORK

No. 1223-A

(Dated February 25, 1916)

Claim for Loss of Use of About Thirty Acres of Agricultural Land Caused by Seepage from the Erie Canal During the Season of 1912.

Claimants ask to recover damages for the loss of the use of about thirty acres of agricultural land, the contention being that this land was made too wet for cultivation and pasturage by reason of water from the Erie Canal seeping from said canal and flowing down upon said lands and covering them with water.

Held, that the evidence failed to show that the damage claimed during the year 1912 was caused by seepage.

CLAIM against State of New York for loss of use of some thirty acres of land caused by seepage from Erie canal.

Ray B. Smith, for claimants.

Egburt E. Woodbury, Attorney-General (Carey D. Davie, Deputy Attorney-General), for State.

PARIS, J.— This claim is for the loss of the use of about thirty acres of agricultural land during the season of 1912; the claim

* Upon appeal by the claimant to the Appellate Division, 3rd Department, the judgment of the Court of Claims was reversed and the matter remitted to the Court of Claims for further consideration with the right to take such other evidence as in its judgment might be proper (178 App. Div. 292).

Upon appeal, however, by the State to the Court of Appeals, that court reversed the judgment of the Appellate Division and affirmed the judgment of the Court of Claims with costs in the Court of Appeals and in the Appellate Division upon the authority of *Buckles v. State of New York*, 221 N. Y. 418. The *per curiam* opinion of the Court of Appeals in the *Butterfield* claim will be found in this volume at page 308, and the opinion of the Court of Appeals in the *Buckles* claim will be found in this volume at page 303.

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being that the said land was made too wet for cultivation and pasturage by reason of waters from the Erie canal seeping from said canal and flowing down upon said lands and covering them with water. The land in question was located in the town of DeWitt, county of Onondaga and State of New York.

From all the evidence in the case it is apparent that all of the land was low and swampy and had not been cultivated for years, but had grown up to brush, cat-tails and weeds. The claim seems to be based upon the theory it was the duty of the State to keep open the ditches on the said land. I find no foundation for such a claim in the testimony. There is little or no evidence of seepage from the canal during the year 1912. At any rate there is not enough of such evidence to warrant the conclusion that the damage claimed during the year 1912 was caused thereby. If water did seep from the canal onto the land that year, the land was in such a condition that it had practically little or no rental value for agricultural purposes that year. There is no allegation in the claim that a notice of intention to file a claim as provided by section 264 of the Code was duly filed and there was no proof of such filing made upon the trial.

The claim should therefore be dismissed.

JOHN WINN v. STATE OF NEW YORK

No. 1494-A

(Dated February 26, 1916)

Claim for Loss of Crops and of the Use of Land for Cultivation During the Season of 1913 by Overflow from Erie Canal.

The principal reliance of the claimant was upon testimony to the effect that after the deepening and improving of the canal, when the water was not in the canal, the lands were reasonably dry, but that after the water was let in the canal the lands became wet.

The Court held that negligence on the part of the State will not be inferred from the bare fact that before certain improvements were made on the canal the land was dry, and that after the improvements the land was wet, it being necessary to show that the water which it is claimed caused the damage came from the canal and was due to the State's negligence.

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Claimant also contended that at some prior time the State opened up ditches across this land to carry off seepage from the canal. The Court held that if such seepage no longer existed there was no obligation upon the State to maintain the ditches.

CLAIM against State of New York for loss of crops and of the use of land for cultivation during the season of 1913, by overflow from Erie canal.

Campbell & Woolsey, for claimant.

Egburt E. Woodbury, Attorney-General (F. B. Valentine, Deputy Attorney-General), for State.

PARIS, J.— This claim is for the destruction of crops of grass and hay and for the loss of the use of land for the purposes of cultivation on account of being too wet during the season of 1913; the claim being that the said land was made too wet for cultivation by reason of seepage from the Erie canal flowing down upon said lands and covering them with water. The land in question was located in the town of Sullivan, county of Madison.

The principal reliance of the claimant is upon testimony to the effect that after the deepening and improving of the canal, when the water was not in the canal the lands were reasonably dry and that after the water was let in the canal the lands became wet.

This court held in the claim of Perkins v. State, 13 Court of Claims, 96, that "Negligence on the part of the State in the alleged flooding of land bordering upon a canal will not be inferred from the bare fact that before certain improvements were made on the canal the land was dry and that after the improvements the land was wet, it being necessary to show that the water which it is claimed caused the damage came from the canal and was due to the State's negligence."

The lands alleged to have been flooded in the Perkins claim were in the same town and county as the claim under consideration, and apparently in the immediate vicinity. Following the decision made in the Perkins claim this claim will have to be dismissed unless there is sufficient evidence of seepage from the canal

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flowing down upon this land to cause the damage claimed. The evidence as to such seepage during the year 1913 is very meagre. If full credence is given to all the evidence on the part of the claimant as to such seepage and the amount thereof, it does not seem reasonable that such seepage could have caused any considerable damage to the property in question. Apparently from the map in evidence and all the evidence in the case, the land in question is wet and marshy and unfit for cultivation, whether there is any seepage from the canal or not, and had been in such condition for years.

It is also contended in this case that at some prior time the State opened up ditches across this land to carry off seepage from the canal. If such seepage no longer existed I see no obligation upon the State to maintain the ditches.

The claim should be dismissed.*

MILFORD D. WHEDON v. STATE OF NEW YORK

No. 2213-A

(Dated February 26, 1916)

Claim for Legal Services Rendered and Expenses Incurred by Claimant in Investigation, Preparation for and Trials of Actions Growing Out of Great Meadow Prison Investigation.

The claimant rendered certain legal services and incurred certain expenses in investigation and in preparation for the trials of certain actions growing out of the Great Meadow prison investigation. The claimant contended that he was orally designated on August 6, 1913, by former Governor William Sulzer, under and by virtue of section 8 of the Executive Law.

The right of the claimant to recover was challenged by the State on various grounds, but the Court did not find it necessary to pass upon these objections because it reached the conclusion that it had no jurisdiction to entertain the claim. One of the limitations upon the jurisdiction of the Court is, that it shall not extend to any claim submitted by law to any other tribunal or officer for audit or determination, except where the claim is founded upon

* The judgment of the Court of Claims was unanimously affirmed by the Appellate Division, Third Department, without opinion, in November, 1917.

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express contract and has been in whole or in part rejected by such tribunal or officer. (See section 264 of the Code of Civil Procedure.)

Under section 8 of the Executive Law, in order to obtain his compensation and expenses, claimant was required to obtain from the Governor an order and from the Comptroller a warrant before the Treasurer was authorized to pay him. Upon the refusal of any one of these officers to observe the statute he had a remedy by mandamus to compel performance, and it was only upon their rejection of the claim in whole or in part that he could have recourse to the Court of Claims. The claim had never been rejected by any officer of the State, and the Court of Claims had therefore no jurisdiction to pass upon the same.

CLAIM for legal services rendered and expenses incurred by claimant in investigating, preparation for and trials of actions growing out of Great Meadow prison investigation.

Milford D. Whedon, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

ROLENBECK, P. J.— This is a claim for legal services rendered and expenses incurred by the claimant in the investigation, preparation for and trials of actions growing out of the Great Meadow prison investigation.

The claimant, it is claimed, was orally designated and appointed to perform such services on August 6, 1913, by former Governor William Sulzer under and by virtue of section 8 of the Executive Law.

The right of the claimant to recover is challenged by the State on various grounds. It is claimed that the appointment was void because it was not in writing. The statute under which the appointment was made requires no such written appointment, but the State claims that there must be read, with the section of the Executive Law under which the appointment was made, section 8 of the Public Officers Law which provides that the commission of every officer appointed by the Governor shall be signed by him and attested, under the seal of the State by the Secretary of State. The appointment is also questioned because it was not filed as required by the same section of the Public Officers Law with

Opinion by Rodenbeck, P. J.

respect to commissions granted by the Governor, and also because the Comptroller was not notified pursuant to section 16 of the State Finance Law, which provides that whenever any liability of any nature shall be incurred by or for any officer, notice that such liability has been incurred shall be immediately given in writing to the State Comptroller. The right to recover is also challenged upon the ground that the compensation was not fixed as provided by section 8 of the Executive Law and no appropriation being available at the time of the appointment, that the Governor was without power to make such an appointment, section 35 of the Finance Law providing that no State officer shall contract any indebtedness on behalf of the State nor assume to bind the State in an amount in excess of money appropriated or otherwise lawfully available.

These objections present serious questions with reference to the right of the claimant to recover. But the court has not found it necessary to pass upon these objections specifically, because it has reached the conclusion that it has no jurisdiction to entertain the claim. One of the limitations upon the jurisdiction of the court is, that it shall not extend to any claim submitted by law to any other tribunal or officer for audit or determination, except where the claim is founded upon express contract and has been in whole or in part rejected by such tribunal or officer; that is, assuming that the claim is based upon express contract, this court has no jurisdiction of the claim unless it has been rejected in whole or in part by the officer having authority to audit the same. Under the statute under which the claimant seeks to recover he was required to be paid by the Treasurer out of any appropriations made for the purpose for which he was appointed "upon the order of the governor and the warrant of the comptroller." Executive Law, § 8. Under this language, in order to obtain his compensation and expenses claimant was required to obtain from the Governor an order and from the Comptroller a warrant before the Treasurer was authorized to pay him. Upon the refusal of any one of these officers to observe the statute he had a remedy by mandamus to compel performance; but at any rate upon their

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rejection of the claim in whole or in part he could have recourse to this court. His claim shows that it has never been rejected by any officer of the State. The statement in the claim is, that it has not been submitted to any other tribunal or officer for audit or determination, except that the claim has been submitted to and approved by former Attorney-General Parsons and has been submitted to Governor Glynn. Instead of having been rejected, therefore, the claim has been approved by a former Attorney-General and has been submitted to a former Governor. Under the statute conferring jurisdiction upon this court it is necessary for the claimant to secure a rejection of his claim by the officer having authority to audit or determine the same.

In view of the serious legal questions involved in connection with the regularity of the appointment, it is suggested that authority be obtained from the Legislature to present the claim to this court, waiving the irregularities mentioned which do not go to the merits of the claim. Substantial services were rendered by the claimant and the State should not take the position of depriving him of a recovery for the reasonable value of such services. This court cannot waive the legal requirements necessary to constitute a valid claim since it has no authority to make an award except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. Code Civ. Pro. § 264. The Legislature, however, may waive any legal defense except that of the Statute of Limitations and may recognize moral claims upon which recovery could not otherwise be had.

The claim should, therefore, be dismissed and the claimant referred to the proper officer for the audit and determination of his claim or to the Legislature for an enabling act.

Ordered accordingly.

Opinion by Rodenbeck, P. J.

PATRICK MCGOVERN & COMPANY v. STATE OF NEW YORK

No. 2375-A

(Dated February 28, 1916)

Claim for Damages on Barge Canal Contract.

The claimant made a contract with the State for dredging and for constructing a lock and a dam. After the work had progressed to a certain point, the State changed the style of construction of the dam, and by two alterations required the contractor to make certain changes which involved additional expense, for which compensation is claimed.

Claimant was allowed the additional cost of constructing coffer dams, pumping, bailing and draining, over and above the amount needed to complete the dam as originally planned, the contractor having bid a flat sum for this work. The Court held that the measure of damages was not the cost to the contractor of doing the work, but the fair and reasonable value of the work.

During the delay of the State while deciding upon the changes in the original plans, a portion of the excavation previously made became filled up without the fault of the contractor. For re-excavating this material he was allowed compensation at the rate provided in the contract.

Claimant was also allowed the cost to him of metal reinforcement for concrete construction which he was unable to use because of change in plans, less the salvage.

CLAIM against the State of New York arising from changes in contracts necessitating increased expenditures by contractor.

Arnold, Bender & Hinman, for claimant.

Egburt E. Woodbury, Attorney-General (Archie Ryder and Joseph P. Coughlin, Deputy Attorneys-General), for State.

RODENBECK, P. J.—The claimant made a contract known as contract No. 71-A with the State for the dredging of the Hudson river from lock No. 1 to lock No. 2 and for constructing lock No. 1 and dam No. 1 below Mechanicville, N. Y.

When the work had progressed to a certain point the State decided to change the style of construction of the dam and by two alterations required the contractor to make certain changes which involved increased expense, for which compensation is now claimed.

One of the claims arises out of the additional cost of construct-

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ing coffer dams, pumping, bailing and draining over and above the amount needed to complete the dam as originally planned. The contractor bid a flat sum for the coffer dam, pumping, bailing and draining, and additional compensation is asked for the increased work under this item. The amount bid by the contractor under this item was for the work that was required under the original plans, and he is entitled to pay for any additional work of this character imposed upon him by the alterations to the original plans. This additional work is estimated at the sum of \$15,031.65. This amount represents the fair and reasonable value of doing the work, which of course includes a reasonable profit to the contractor. The measure of damages in such a case is not the cost of doing the work to the contractor, but the fair and reasonable value of the work.

Another item is for re-excavation that the contractor was required to do by reason of the delay of the State while it was deciding upon the changes in the original plans. During this delay a portion of the excavation previously made by the contractor became filled up through no fault of the contractor, and for excavating this material he is entitled to compensation at the rate provided in the contract. The amount of this excavation was 694 cubic yards and the amount to be allowed therefor is \$1,769.70.

A third item relates to a claim for metal reinforcement for concrete construction which the contractor was unable to use by reason of the change in the original plans. This material was charged to the State at the cost to the contractor less the salvage, making an allowance to the contractor of \$254.86.

The claimant is therefore entitled to an award of \$17,056.21.

EMPIRE ENGINEERING CORPORATION v. STATE OF NEW YORK

No. 1823-A

(Dated February 29, 1916)

Claim for Damages on Barge Canal Contract.

Claimant entered into a contract with the State for the improvement of a portion of the Barge canal. One item of work provided for 69,400 cubic yards

Opinion by Rodenbeck, P. J.

of wash wall at \$2.50 per cubic yard. A dispute arose as to whether or not the contract, plans and specifications required the contractor to place coping on the top of the wash wall for the price above specified.

The Court construed the contract to mean that the claimant was not required to place coping on the wash wall except where shown on the plans and that the claimant having been required to place a coping on the wash wall where it was not shown was entitled to recover the reasonable value thereof.

The Court held that the clause in the contract providing that in case of any discrepancy or ambiguity in the plans, specifications or maps, or between them, the State Engineer shall make a decision in relation thereto which shall be final and conclusive upon the parties had no application in this case as there was no discrepancy or ambiguity. The clause in question relates to work which is required but concerning which some discrepancy or ambiguity exists. It is not the purpose or scope of such a clause to impose work upon a contractor that does not appear upon the plans and cannot reasonably be implied from the plans. It does not confer authority upon the engineer to add additional work and impose unnecessary expense not called for by the contract in express or implied terms.

CLAIM arising from the contention of the contractor that the requirements of his contract on the Barge canal improvement known as contract No. 64, does not require him to place coping on the top of the wash wall for the price of two dollars and fifty cents per cubic yard.

Kellogg & Rose, for claimant.

Egburt E. Woodbury, Attorney-General (Joseph P. Coughlin, Deputy Attorney-General) for State.

RODENBECK, P. J.— This claim arises out of a contract dated August 6, 1908, between the parties known as Barge canal contract No. 64 for the improvement of the Erie canal from a point 600 feet west of Prospect street bridge, Medina, to 100 feet east of Gasport bridge in Gasport, a total distance of construction of 9.91 miles.

Claimant was to be paid by the State at certain specified prices for the work which was to be done "in accordance with the plans and specifications" attached to the contract and forming a part thereof.

One of the items of work to be performed by the claimant was

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designated as item No. 18 and provided for 69,400 cubic yards of wash wall at two dollars and fifty cents per cubic yard.

The dispute arises over the question as to whether or not the contract, plans and specifications require the contractor to place coping on the top of the wash wall for the price above specified.

There is no separate price provided for coping but the claimant was required for the price stated to place coping wherever it was required by the plans. This provision is found in the section of the specifications which provides that: "When required by the plans, the walls shall be coped with flagstones in length not less than two feet, and the other dimensions as shown upon the plans, roughly dressed and laid close together to grade of elevation shown." § 191.

There is nothing in the printed contract itself to throw any light upon the dispute between the parties except as above referred to and these provisions seem to favor the construction that the claimant was required to cope the wash walls only where such coping is shown on the plans.

The section of the specifications which provides the compensation that claimant is to receive for wash wall is not to be construed as requiring a coping throughout the contract where not shown on the plans, but must be read in connection with the section of the specifications above quoted and to mean that wherever under the contract, plans and specifications the claimant was required to place coping it was not to receive any additional price therefor but was to receive a flat rate for wash wall whether coped or not.

This form of specification as to price is consistent with the form of contract which requires a small amount of coping as well as one which requires coping throughout and in the absence of anything on the plans showing a coping does not of itself indicate an intention to have the wash wall coped except where coping is shown upon the plans.

No coping whatever is shown upon the plans except on the sheets which relate to culvert construction. These sheets can hardly be considered as evidence that the claimant was required to cope the entire wash wall since the specifications provided that it

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was to cope only where required by the plans. The culvert sheets are confined to the culverts and there is a special reason for coping a wash wall around a culvert which does not necessarily apply to an ordinary wash wall on the bank of the canal but even in the case of culverts there is one sheet which fails to show a wash wall, whether through error or through design does not appear.

The remaining sheets of the contract where a wash wall is shown instead of designating a coping rather indicate that it was the design that no coping should be placed on the wash wall, for not only do the sheets showing the prism of the canal which is necessarily upon a small scale fail to show coping but the detailed plan of the wash wall drawn upon a larger scale than the wash wall shown upon the sheets of the prism of the canal fail to show any coping.

The omission from the plans is especially significant when it is considered that the sample provided by the State for indicating work to be done on the Barge canal expressly shows how the coping is to be indicated when required on the top of the wash wall.

It would seem from these considerations that the contract made between the parties did not require coping to be placed on the wash wall except where shown on the plans and that the claimant having been required to place a coping on the wash wall where it was not shown is entitled to recover the reasonable value thereof.

The clause in the contract providing that in case of any discrepancy or ambiguity in the plans, specifications or maps, or between them, the State Engineer shall make a decision in relation thereto which shall be final and conclusive upon the parties has no application as in this case there is no discrepancy or ambiguity. As above stated the plans do not call for a coping on the wash wall except at culverts. This clause of the contract was not designed to give the State the power through the State Engineer to add work to a contract which is not shown upon the plans and not required by any other portion of the contract. The clause in question relates to work which is required but concerning which some discrepancy or ambiguity exists.

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The general rules for the construction of this contract are well understood and it is not necessary to dwell upon them. The clause relating to inaccuracies and ambiguities is one made by the parties and has its proper sphere of operation which does not extend however to the point of adding work not fairly required by the plans or specifications. It is not the purpose or scope of such a clause to impose work upon a contractor that does not appear upon the plans and cannot reasonably be implied from the plans. It does not confer authority upon the engineer to add additional work and impose unnecessary expense not called for by the contract in express or implied terms.

Similar clauses giving authority to the engineer to give directions as to the performance of a contract have been construed by the courts and there are abundant authorities for a recovery by a contractor where the engineer refused to permit the contractor to perform work called for by the contract (*McMaster v. State*, 108 N. Y. 542; *Byron v. Low*, 109 id. 291); where he gave a wrong grade or other direction and caused the contractor either to do additional work or to do over work already done (*Messenger v. City of Buffalo*, 21 N. Y. 198; *Dwyer v. Mayor*, 77 App. Div. 225; *Brady v. Mayor*, 132 N. Y. 415; *Mulholland v. Mayor, etc., City of New York*, 113 id. 631); where he required the contractor to do work in a way not called for by the contract thus entailing more expensive work than could otherwise be required (*Horgan v. Mayor of New York*, 160 N. Y. 516; *People ex rel. Powers & Mansfield Co. v. Schneider*, 191 id. 523); where he required the contractor to do over work already properly done (*Gearty v. Mayor*, 171 id. 72); or where he required the contractor to do work not called for by the contract. *People ex rel. Powers & Mansfield Co. v. Schneider*, 191 N. Y. 523.

Each case, however, must stand upon its own facts and this case, except for the principles of law enunciated upon the facts established, is not to be construed as an authority for a recovery in all cases where the engineer has assumed to act under the clause in question in this case.

The contract made between the parties is the measure of their obligations and interpreting the contract by the recognized rules of law, claimant is entitled to recover.

Opinion by Webb, J.

INGALLS STONE COMPANY v. STATE OF NEW YORK

No. 10619

(Dated April 22, 1916)

Claim of Lien on Amount Alleged to be Due by the State to a Contractor.

The judgment in a Supreme Court action by one of the lienors against a construction company which had a contract with the State for the construction of the New York State School of Agriculture at Canton, N. Y., and also against the State and all other lienors, to determine the amount due the contractor from the State, and the amount and validity of the respective liens, awarded to the claimant "the sum of \$1,770.58, with interest from February 5th, 1908, the amount of its lien filed March 11th, 1908, established herein, or so much thereof as said funds properly applicable thereto will pay of the same."

The Court held that the claimant's lien only extended to the amounts due the contractor from the State after the full completion of the contract; that when the contractor ceased work the State owed him \$6,444.15 which was payable on the performance of his contract; that he never complied with the condition or completed his work, and that hence the money was never payable to him nor to the lienors claiming under him.

The claim was dismissed.

CLAIM against the State of New York arising from work done and materials furnished for a contractor with a State contract.

Deyo, Hotchkiss & Carver, for claimant.

Egburt E. Woodbury, Attorney-General (George L. Meade, Deputy Attorney-General), for State.

WEBB, J.—While proofs in this case were somewhat voluminous, they were wholly documentary and the point at issue clearly defined.

In July, 1907, the State contracted with Clements Construction Company for a New York State School of Agriculture at St. Lawrence University, at Canton, N. Y., to be fully completed for the sum of \$75,471, pursuant to chapter 682 of the Laws of 1906, authorizing the work. On the 5th of February, 1908, there had been considerable amounts of money paid to the contractor, but there was then due and payable to the construction company \$2,078.86, and the further sum of \$6,444.15, earned but not pay-

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able until the building had been fully completed and accepted by the State, pursuant to the statute above referred to.

On the last mentioned date the work was suspended by the contractor, and thereafter upwards of twenty liens were duly filed against the work.

Thereafter an action was brought by Ogden H. Tappan and another, lienors, against the construction company, the State of New York, and all other lienors, to determine the amount due the contractor from the State, and the amount and validity of the respective liens.

The contract, which was in evidence, provided that if the contractor failed to perform the work the State might complete it in accordance with the terms of the contract, and pay for such completion, "Out of the unpaid balance of the original contract price if sufficient, and if insufficient collect the deficit from the contractor or his bondsman, in such manner as the State may choose." This provision required the State to spend the unpaid balance of \$6,444.15 on the completion of the building, and limited the State's recovery against the bondsman to the difference between that sum and any increased cost to the State of completing the contract over and above that sum.

The judgment in the action was entered November 24, 1908, and determined that on February 5, 1908, there was due and payable to the contractor from the State the sum of \$2,078.86, and the further sum of \$6,444.15, earned by the contractor, which would become due when the building was completed and accepted by the State, pursuant to the statute authorizing the work, which said sums of money were subject to the costs and expenses of the action and the payment of the liens in the order specified therein. The judgment determined that the costs and allowances of the action, and the plaintiff Tappan's lien, were the first liens upon the funds due or to become due the contractor after the building was completed and accepted by the State of New York, and the amount of the liens was payable, "Out of the said funds or so much thereof properly applicable thereto will pay the same," and that the plaintiff should have judgment against the defendant

Opinion by Webb, J.

Clements Construction Company for the amount of any deficiency of the lien after applying thereon all moneys properly applicable thereto.

The decree adjudicated the respective liens, including the lien of the claimant in this action, and awarded to the Ingalls Stone Company, "The sum of \$1,770.58, with interest from February 5th, 1908, the amount of its lien filed March 11th, 1908, established herein, or so much thereof as said funds properly applicable thereto will pay of the same," and that said defendant Ingalls Stone Company, "Have judgment against the Clements Construction Company for the amount of any deficiency remaining unpaid, after applying all moneys properly applicable thereto."

In my view of the case the claimant's lien only extended to the amounts due the contractor from the State after the full completion of the contract. When the contractor ceased work the State owed him \$6,444.15, which was payable on the performance of his contract. He never complied with the condition or completed his work, and hence the money was never payable to him nor to the lienors claiming under him. The State completed the building in accordance with the provisions of the contract at a sum in excess of this \$6,444.15.

Great stress was laid at the trial on the fact that two liens subsequent to that of the claimant herein had been adjudicated by the Board of Claims to be valid liens against the State. This court does not deem itself bound by any such adjudication. On the papers presented to this court, the claimant has failed to make out a liability of the State for the indebtedness of the Clements Construction Company to the claimant, and the claim should accordingly be dismissed.

Ordered accordingly.*

* The judgment of the Court of Claims was unanimously affirmed by the Appellate Division, Third Department, without opinion. 178 App. Div. 942. The claimant appealed to the Court of Appeals on May 31, 1917.

Pronath v. State of New York

WILLIAM PRONATH v. STATE OF NEW YORK

Nos. 930-A and 2435-A

(Dated May 8, 1916)

Claim for Damages from Leakage from the Erie Canal.

Where claimant demands damages alleged to have been caused by leakage from the canal, the burden is on him to show that the water causing the damage came from the canal. Claimant does not establish his cause of action simply by showing that his land is dry when water is out of the canal and wet when water is in the canal.

CLAIM against the State of New York arising from the alleged seeping of water from the Erie canal.

Gerald B. Fluhrer, for claimant.

Egburt E. Woodbury, Attorney-General (Frank B. Valentine, Deputy Attorney-General), for State.

ACKERSON, P. J.— The claimant is the owner of a farm in the town of Ridgeway in the county of Orleans in this State which is bounded on the south by the Erie canal. He claims that his farm was damaged by leakage from the canal in the sum of \$110 for each of the years 1910, 1911, 1912, 1913 and 1914.

In this case the State's witnesses say there is no evidence of leakage from the canal; that claimant has some swale lands on his farm and that even they were dry; that there is considerable swale land in that vicinity, some of which is higher than the canal. The witnesses for the State were intelligent farmers and apparently fair and candid men.

There was no effort made on the part of the claimant and his witnesses to show how the water they claimed was on this farm came from the canal — claimant simply says: "When water is out of the canal, everything dry; when water is in the canal, everything wet." This is merely assuming that the water came from the canal, but is not proof of that fact. The burden is on the claimant to show that the water he speaks of came from the canal. This he has failed to do.

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As was said by Judge Rodenbeck in the case of Perkins v. State, 13 Court of Claims, 98: "The claimants rely upon proof that before the canal was improved in 1897 the land was dry and tillable, and that after the improvement it became wet and untillable. This evidence is insufficient to charge the State with claimant's injuries. Other causes may have produced the result which they allege occurred immediately after the improvement of the canal."

The claim should be dismissed.

Fennell and Paris, JJ., concur.

ARTHUR B. HULL v. STATE OF NEW YORK

No. 1480-A

(Dated May 8, 1916)

On August 9, 1913, the claimant while returning from the city of Rochester to his home in Gasport, arrived at the lift bridge over the Erie canal at Gasport about 8:30 P. M. It was dark and his automobile lamps were lighted. He neither saw nor heard anything indicating that the bridge was raised until he was so near it that it was impossible to avoid a collision.

From a consideration of the evidence the Court held that there was no warning given which claimant could hear or see until just as he was about to collide with the bridge; that the automobile has become one of the most important means of conveyance over our public highways, and that in all situations like the one under consideration it is the duty of the State to give some warning which can be seen or heard by a cautious and watchful driver of such machines.

CLAIM against the State of New York arising from personal injuries received by claimant in colliding with a lift bridge maintained and operated by the State over the Erie canal at Gasport, N. Y.

Slee & Kent, for claimant.

Egburt E. Woodbury, Attorney-General (George L. Meade, Deputy Attorney-General), for State.

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ACKERSON, P. J.— This claim is one for damages against the State resulting from personal injuries received by the claimant and also for injury to claimant's automobile by reason of a collision with a lift bridge maintained and operated by the State over the Erie canal at Gasport, N. Y. On August 9, 1913, claimant alleges that he was returning from the city of Rochester to his home in the village of Gasport aforesaid with his family and others in his automobile; that he arrived at the bridge in question at about 8:30 P. M.; that it was then so dark that it was necessary to have the lamps on his automobile lighted; that he was approaching the said bridge on a long 6 per cent grade from the north; that he was looking and listening for any signal that the bridge was being raised; that he saw nothing and heard nothing to indicate that the bridge was being raised until he arrived within a few feet of the bridge when it was impossible to avoid the collision.

The court is clearly of the opinion that no sufficient warning was given to the claimant that the bridge in question was being raised.

The accident happened in the night time. There was no light of any kind on the bridge, except a red light under the bridge which could not be seen until the bridge was raised about three feet. The gong was struck only three or six times, at most, before the operator started to raise the bridge, and at a time when apparently the claimant was too far away to hear it. The approach to the bridge was an up-grade of about 6 per cent and claimant testified he could not actually see the floor of the bridge until he arrived within about ten feet of it. The claimant was apparently running at a moderate rate of speed as he approached the bridge and together with those in the car with him, was endeavoring to see if the bridge was clear, so that he can not be charged with contributory negligence. He did not hear any warning nor see that the bridge was being raised until just the instant before he struck it.

In the case of Berenstein v. State, 13 Court of Claims, 143, the court used this language: "Before the bridge was raised, the gong was sounded, warning all approaching it was about to be lifted. The gong was struck ten or twelve times and was heard

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twenty-five feet, or more, away. Red lights were placed upon the bridge and so exposed that those expecting to cross it could see the danger signal. The flagman stood before the bridge in the street with a red lantern in his hand giving his warning to stop, and of peril."

The court very properly held that with such precautions the State was not liable to the claimant who ran on the bridge while it was being raised and was injured. But in the case at bar there was absolutely no warning given which claimant could hear or see until just as he was about to collide with the bridge. He could not hear the gong because of the distance he must have been away when it was sounded and because of the noise made by his car. He could not see the red light because the bridge had not raised high enough to expose it. He, therefore, had no warning that the bridge was being raised that enabled him to stop in time. The automobile has become one of the most important means of conveyance over our public highways. It becomes necessary, therefore, that in all situations like the one under consideration some warning must be given which can be seen or heard by a cautious and watchful driver of such machines.

From the evidence in this case, therefore, it clearly appears that the State was negligent in the operation of this bridge at the time in question; that claimant was free from contributory negligence; and that therefore the State is liable to the claimant for such an amount of damages as he suffered by reason of the accident.

It appears from the evidence that the cost of repairing claimant's automobile was \$117 and depreciation of car by reason of accident about \$150; that claimant paid doctor, and for trusses \$81, in all \$348. The balance to be awarded claimant is for the hernia resulting from the accident. Dr. Moore testified that it was more probable that the hernia was the result of the former accident than of the one in question, but that it was, in any event, an incomplete hernia which could easily be cured for \$150.

We are of the opinion, therefore, that an award of \$700 for this injury, together with the \$348 above mentioned, in all \$1,048 is ample in this case.

Fennell and Paris, JJ., concur.

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KATE B. ACER v. STATE OF NEW YORK

No. 8187

(Dated May 8, 1916)

Claim for Damages from Overflow.

In a claim for damages for flooding in 1905, the claimant's evidence was the testimony of witnesses taken in 1903 as to the flooding of the same premises in 1902. The Court held that the burden was upon the claimant to show that the damage was caused through the negligence of the State, and that the claimant could not meet and overcome that burden by evidence of what took place in 1902; conditions might be entirely different in 1905 than in 1902. It was also held that if the rainfall in the natural watershed of the creek which was alleged to have overflowed was sufficient to cause the creek to overflow its banks and flood claimant's farm, irrespective of any other cause, then it is immaterial what the State did.

The claim was dismissed.

CLAIM against the State of New York for damages alleged to have resulted from the negligence of the State in so flooding a canal feeder as to cause the flooding of claimant's farm.

L. M. Sherwood, for claimant.

Egburt E. Woodbury, Attorney-General, for State.

ACKERSON, P. J.— This claim is for damage to claimant's crops between May and October, 1905, caused by flooding. Claimant's farm of 360 acres is situated on the Oak Orchard creek in the town of Shelby, Orleans county, N. Y. The State many years ago constructed a canal feeder from Tonawanda creek to Oak Orchard creek which enters Oak Orchard creek a short distance below claimant's farm. The farm is very level, lying on the edge of what is known as Tonawanda swamp. The claimant contends that the State through this feeder has turned so much water into the Oak Orchard creek that it caused the flood in question.

The contention of the claimant may well be scrutinized closely for the reason that the claim has not been brought to trial promptly but has been allowed to sleep for about ten years. Also,

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from the further fact that on the 17th day of January, 1906, when claimant swore to her claim, and when presumably the facts constituting it were fresh in her memory, she only asked \$1,800 damages, and on the 24th day of September, 1915, when the claim was tried, she proved \$3,470 damages. The wonderful growth this claim has made in ten years is illustrated by the following table:

Crops	Damages claimed in 1906	Damages claimed in 1915
90 acres of hay	\$900	\$1,800
60 acres of oats	540	540
12 acres of corn	180	240
2 acres of potatoes	60	80
8 acres of beans	120	160
65 acres of pasture	0	650
Total	<u>\$1,800</u>	<u>\$3,470</u>

It is wonderful how the memory of claimant's husband, who had charge of the farm and who gave the items, as he testifies, to claimant's attorney which were inserted in the claim, has so improved by time that after the lapse of ten years he can remember so clearly that he can swear that he overlooked about one-half of the damage when the claim was drawn.

The claim is for damage for flooding in 1905. The evidence offered to prove the State's liability is the testimony of witnesses taken in 1903 as to the flooding of the same premises in 1902. The burden is upon the claimant to show that the damage was caused through the negligence of the State. The claimant cannot meet and overcome that burden by evidence of what took place in 1902. Conditions might be entirely different in 1905 than in 1902. If the rainfall in the natural watershed of Oak Orchard creek was sufficient to cause the creek to overflow its banks and flood claimant's farm, irrespective of any other cause, then it is immaterial what the State did.

The claimant's position is that by reason of water being brought

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through the feeder constructed by the State from Tonawanda creek and other places outside of the Oak Orchard creek watershed, that it so raised the water in Oak Orchard creek as to cause it to overflow claimant's farm and thereby inflict the damage complained of. But he undertakes to prove this by what happened in 1902 instead of 1905. Between those dates the channel of Oak Orchard creek was enlarged and the guard-gates at the head of the feeder were repaired to prevent the water from coming into the feeder from Tonawanda creek. See evidence of Horace Andrews, p. 136, stenographer's minutes; of Mark Welsh, at p. 172, and Mr. Waldo at p. 136. The claimant therefore has failed to show that the rainfall on the Oak Orchard creek watershed during the time in question could have been carried in the channel of that creek without flooding, and has also failed to show that the flood in question was caused by the negligence of the State.

The claim must therefore be dismissed.

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No. 9512

ROBERT H. ASH *v.* STATE OF NEW YORK

No. 9511

ELBRIDGE KELLEY *v.* STATE OF NEW YORK

No. 9513

(Dated May 11, 1916)

Claim for Damages Resulting from Acts of a State Highway Contractor.

In constructing a state highway along claimant's land, the contractor took stone fences on the land and used the stone in the construction of the road. Stumps, stones, gravel and debris were thrown from the highway by the contractor on to the lands of the claimant, causing substantial damage to the

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claimant. The State had not appropriated the stone fences nor the land upon which this material was thrown, nor had it designated said stone fences for construction purposes or said land for spoil purposes.

The Court held that the acts of the contractor were without the purview of his contract with the State but were his individual acts done for his own convenience and upon his own authority; and that for such acts the contractor and not the State was liable.

The claim was therefore dismissed.

CLAIM against the State of New York for damages to lands by the action of a State highway contractor.

George B. Russell, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

FENNELL, J.—In October, 1908, claimant was the owner of land in Arkville, Delaware county. At that time the State, through a contractor was constructing a State highway along said land.

Stone fences were taken by the contractor and used in the construction of the highway. Stumps, stones, gravel and debris were thrown from the highway by the contractor in the progress of the work on to the lands of the claimant, causing substantial damage to the claimant.

It did not appear upon the hearing of the claim that the State had appropriated, either permanently or temporarily, lands upon which the stumps and debris were thrown, nor did it appear that the State had appropriated the stone fences, nor did it appear that the State had made any map showing the contractor had the right to use such lands for spoil purposes, or such stone fences for construction purposes.

The act of the contractor was not within the purview of his contract and was his individual act done for his own convenience and upon his own authority. The contractor was as much bound to pay for the stone fences used in the construction of the road as he would have been to pay for trap rock, limestone, rock or other materials brought from a greater distance. The contractor was acting entirely outside of the scope of his contract when he

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assumed to place spoil on lands not provided by the State as spoil area.

The contractor and not the State is responsible for the acts complained of.

The claim should be, and is, dismissed.

W. L. WAPLES COMPANY v. STATE OF NEW YORK

No. 2161-A

(Dated May 11, 1916)

Claim to Recover Damages on Contract for Cleaning State Capitol.

Claimant was awarded the contract for cleaning, pointing and waterproofing the exterior stone work of the State Capitol after the fire which occurred on March 29, 1911. Section 9 of the contract contained the following provision: "No charges shall be made by the contractor for any delays or hindrance from any cause during the progress of any portion of the work embraced in the contract."

Tests made of the material designated by the State for waterproofing demonstrated that the material was unsatisfactory, and after some delay the State designated a substitute preparation. This delay increased the expense of the work to the contractor, for which he sought to recover. The Court held that the failure of the State to designate the kind of waterproofing preparation was in reality an actual interference with the progress of the work; that it was not a delay or hindrance such as is mentioned in section 9, but was in fact a direct act on the part of the State itself which precluded the claimant from using the customary, orderly and economical methods required in the progress of the work; that the State failed in its duty to designate in due season the kind of waterproofing to be used, and that it should pay the contractor the increased expense resulting therefrom.

The claimant also sought to recover the expense resulting from the loss of time on the part of his workmen due to an order delivered to the contractor to stop the progress of the work during the sessions of the Court of Impeachment. The Court held that this also was not a delay under section 9 of the contract, but was a direct interference on the part of the State with the progress of the work undertaken by claimant under the contract; that although the stopping of the work was proper and the order was made within the power of the officer issuing it, it did not relieve the State from its liability for the natural and actual consequences of its own act.

The final estimate was made and signed by the State Architect on July 14, 1914, and the notice of intention to file the claim was filed on December 30, 1914. The Court held that the notice was filed in time; that the six months' period under section 264 of the Code of Civil Procedure did not commence to

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run until the liability accrued, and that the liability accrued when the State Architect certified the final payment, in which he did not include the items set forth in the claim and thereby rejected them.

CLAIM against the State of New York for cleaning, pointing and waterproofing the exterior stone of the Capitol.

William E. Woollard, for claimant.

Egburt E. Woodbury, Attorney-General (Archie C. Ryder, Deputy Attorney-General), for State.

FENNELL, J.—Claimant was awarded the contract for cleaning, pointing, and waterproofing the exterior stone work of the Capitol after the fire which occurred on March 29, 1911. Contract was awarded to claimant as the lowest bidder — claimant being lowest bidder by a very considerable amount.

Claimant's method of cleaning the outside of the Capitol building was not by the erection of fixed scaffolds and working therefrom, but by suspending movable scaffolds from the top of the building and raising and lowering the same as do painters in painting the outside of a tall building. The first operation was to suspend a large scaffold from the top of the building and apply a compressed air sandblast to the face of the stone, the expelled sand being caught and returned to the ground in a pipe. When a strip the width of the scaffold was cleaned from the roof to the ground the scaffold was moved to clean another strip in similar fashion. Next, a light scaffold was swung from the top of the wall and the interstices between the stones were pointed. When a strip was pointed from the top of the wall to the bottom, the orderly and economical progress of the work required that the scaffold be raised to the top of the wall and let down again along the same strip while the waterproofing was applied with brushes.

The State had designated the use of Minwax as the waterproofing material. Claimant informed the State Architect that Minwax would darken the stone. Tests were made and the preparation did darken the stone. The preparation was applied to the stone work on the down hill side of the last window toward Eagle street on the ground floor on the Washington avenue side of the Capitol. The stones at that point still show a darkened color. It was deter-

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mined not to use the waterproofing preparation, but a substitute was not decided upon at the time. Some time later, and on or about September 15, 1913, a substitute preparation was designated by the State Architect. In the meantime claimant had to proceed with his work and in proceeding had to move the scaffolds as the work progressed. Had the waterproofing preparation been determined upon and ready for use it would have been applied immediately after the pointing was finished and before the scaffold used for pointing had been unslung and rerigged for the next strip of wall. The delay in designating the waterproofing preparation required the rerigging of twenty-five scaffolds. This rerigging required two hours for three men for each scaffold, at seventy-five cents per hour, making \$225.

It would seem that the failure of the State to designate the substitute waterproofing preparation in time to permit the claimant to apply the same in the orderly and economical progress of the work was not a delay or hindrance under section 9 of the specifications. Section 9 contains the following: "No charges shall be made by the contractor for any delays or hindrance from any cause during the progress of any portion of the work embraced in the contract."

The failure of the State to designate the kind of waterproofing preparation was in reality an actual interference with the progress of the work. It was not a delay or hindrance such as is mentioned in section 9, but was in fact a direct act on the part of the State itself which precluded the claimant from using the customary, orderly and economical methods required in the progress of the work. It was the State's duty to designate, in due season, the kind of waterproofing to be used. It failed in that duty. It is undoubtedly true that the failure was caused by the making of experiments and tests to find out the proper waterproofing preparation to be used. The State official in charge properly delayed the designation until such time as he was satisfied that the right preparation had been chosen. The good faith of the State official in endeavoring to find the right preparation does not relieve the State from its duty to have the designation made in due season. The State should pay this item of damage to the contractor.

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The next item of damage claimed by the contractor is the loss of two hours per day of eight men for twenty-five days, at sixty cents per hour, or \$240.

This loss of time was due to an order delivered to the claimant to stop the progress of the work during sessions of the Court of Impeachment. The operations carried on in the progress of the work were so noisy that they interfered with the hearings before the Court of Impeachment. It is contended on behalf of the State that this also is a delay under section 9 of the specifications.

The State had a right to suspend the work, and claimant's failure to obey the direction to stop the work during the hearings in the Court of Impeachment would have made him guilty of a misdemeanor under the Penal Law (§ 600) as well as becoming liable for a criminal contempt under section 750 of the Judiciary Law.

The order to stop the work, so as not to interfere with the hearings before the Court of Impeachment, was a direct interference on the part of the State and was an arbitrary stopping by the State of the progress of the work undertaken by the claimant under the contract. The stopping of the work was proper and the order made was within the power of the officer issuing it, but this does not relieve the State from its liability for the natural and actual consequences of its own act. The claimant was entitled not to be interfered with by the State in the progress of the work under his contract with the State. It would seem improper to permit the State, for reasons entirely outside of the contract, to directly interfere with the progress of the work which the claimant had contracted to do, and then relieve itself from liability for the interference by saying it was "a delay or hindrance" of the character indicated in section 9 of the specifications.

It is further contended by the State that the claimant failed to file a "notice of intention to file a claim" within the statutory period of six months and in the manner provided by law.

The notice of intention bore an indorsement reading "due and timely service admitted." This admission was signed by the Attorney-General of the State of New York. The indorsement was made December 30, 1914. The contract was made July 29,

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1913. The final estimate was made and signed by the State Architect on July 14, 1914, which date is within six months of December 30, 1914. The six months' period did not commence to run until the liability accrued. The liability accrued when the State Architect certified the final payment, in which he did not include the items set forth in the claim and thereby rejected them.

The claim should be and is allowed for \$465.

Claim allowed.*

* Upon appeal by the State to the Appellate Division, Third Department, the latter Court disallowed the first item of the claim, but allowed the second item. 178 App. Div. 357. Judge Lyon's opinion reads in part as follows:

"It appears from the letter of the representative of a waterproofing compound proposed by the claimant that time was necessary for the proofing to cure after being applied in order to determine the result of its use. The selection of the proper waterproofing was a matter of importance, and the State was entitled to take all the time necessary in which to investigate as to the merits of the various compounds and to reach an intelligent conclusion. I think that all reasonable and necessary delays incident to that purpose should be held to have been within the contemplation of the contract, and hence that under the clause before quoted the State should be held to be exempted from all liability on account thereof but that the claimant was entitled to a corresponding extension of time in which to complete its contract. This was apparently allowed it as no claim seems to have been made by the State for the stipulated penalty on account of the failure of the claimant to complete the contract within the stipulated period. Under the contract the burden of obtaining and proposing to the State Architect suitable waterproofing was upon the claimant. Upon the hearing before the Court of Claims the burden of establishing the liability of the State was also upon the claimant. The evidence fails to establish claimant's contention that the State subjected the claimant to any unreasonable and unnecessary delay in fixing upon the waterproofing to be used. I think, therefore, that the first item of the claim should have been disallowed.

"The second item of damages stands upon a different footing. The contract should be reasonably construed. (*Curnan v. D. & O. R. R. Co.*, 138 N. Y. 480.) That there would be delay resulting from the holding of the impeachment trial necessitating temporary suspensions of the work was plainly not within the contemplation of the parties. These delays were caused by the active interference of the State authorities in the prosecution by claimant of its work which so far as appears was being properly conducted and making no more noise than was actually necessary. The contract had not in contemplation that compensation was to be made for such delays by mere extension of time for the performance of the contract. I think the allowance of the second item of the claim was proper.

"The judgment appealed from should be modified by reducing the award to \$240, and as so modified affirmed, without costs to either party in this court."

All concurred, except Kellogg, P. J., and Cochrane, J., who dissented, and voted for reversal.

Judgment modified by reducing the award to \$240, and as so modified affirmed, without costs to either party in this court.

Opinion by Fennell, J.

JOSEPH DERRICK v. STATE OF NEW YORK.

No. 6624

(Dated May 16, 1916)

Motion to Amend Overflow Claim.

Claimant was the owner of land along Wood Creek in the town of Rome, Oneida county. On November 8, 1902, he filed a claim to recover damages resulting, as alleged, from the overflow of water in June, 1901, upon said land. There was a substitution of attorneys shortly prior to the beginning of the March, 1915, term of the Court of Claims, and the claim was brought on for trial by the substituted attorneys on March 24, 1915. At the conclusion of the hearing the attorneys for the claimant requested that the matter be held open to permit claimant to introduce further evidence. His attorneys on January 8, 1916, noticed a motion to amend the original claim by alleging another and additional cause of the flood in June, 1901.

The court held that even if the present attorneys for claimant had, since their substitution, used due diligence in the prosecution of the claim and in their attempt to have the claim amended, their diligence did not excuse the long delay which actually occurred between the filing of the claim and the motion to amend the same; that the proposed amendment alleged certain facts that ought to have been contained in the original claim or to have been added by amendment within a reasonable time after the original claim was filed; and that it was too late, after the expiration of fourteen and one-half years, to put the burden upon the State of attempting to find witnesses to a condition which should have been brought to the attention of the State more than a dozen years ago. The motion to amend was accordingly denied.

APPLICATION for leave to amend claim filed November 8, 1902, the claim being heard March 24, 1915.

Davies, Johnson & Wilkinson, for claimants.

Egburt E. Woodbury, Attorney-General, for State.

FENNELL, J.— In June, 1901, claimant's lands, located along Wood creek, in the town of Rome, county of Oneida, State of New York, were overflowed. Claimant alleges in his claim that the overflow was caused by the discharge of waters from the fifty-six-mile level of the Erie canal into the channel of Wood creek; that the additional waters were discharged into the creek over a waste

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weir and through the weir gates; that the State of New York, through its agents, negligently opened the gates of the waste weir and through said negligence discharged large quantities of water into Wood creek, and from thence on to claimant's lands.

The claim was filed November 8, 1902, the attorney for the claimant at that time being Charles R. Coville. The present attorneys for claimant became such shortly prior to the beginning of the March term of this court in 1915.

The claim was heard March 24, 1915. At the conclusion of the hearing of the claim the attorneys for the claimant requested that the matter be held open to permit claimant to introduce further evidence.

Attorneys for claimant on January 8, 1916, noticed a motion to amend the original claim. The amendment sets up a distinct cause of action. The notice of motion states the proposed amendment, which is substantially as follows: "That in the construction of the old Erie canal Whitall's creek flowed into the Mohawk river; that said creek was cut off from the river and turned into the canal and became a feeder of the canal; that upon the enlargement of the Erie canal about 1855, a diving culvert was constructed under the enlarged Erie canal to carry the waters of said creek to the Mohawk river; that, at the time of overflow in Wood creek out of which the claim arises, the State permitted the diving culvert carrying Whitall's creek to become clogged up; that the waters so dammed back by the clogged culvert ran through the bed of the abandoned Erie canal into Wood creek; that the waters thus diverted from Whitall's creek added to the flow in Wood creek."

This claim arose in June 1901, and was heard March 24, 1915, nearly fourteen years intervening. The motion to amend is made fourteen and one-half years after the claim arose.

It may well be that the present attorneys for claimant, since the claim was placed in their hands, have used due diligence in the prosecution of this claim and in their attempt to have the claim amended. The diligence of the attorneys now acting for the claimant does not excuse the long delay which actually occurred

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between the filing of the claim and the motion to amend same. The proposed amendment alleges certain facts which ought to have been contained in the original claim or to have been added by amendment within a reasonable time after the original claim was filed. The State not having been notified of the alleged contributing causes of the flood in June, 1901, namely, the additional waters from Whittall's creek, due, as claimed, to the clogged up diving culvert, the State could take no steps toward obtaining evidence as to the clogged up conditions of the diving culvert, nor as to the waters passing through the old abandoned Erie canal channel into Wood creek. It is altogether too late now, after the expiration of fourteen and one-half years, to put the burden upon the State of attempting to find witnesses to a condition which should have been brought to the attention of the State more than a dozen years ago.

Motion to amend is denied.*

AUGUST SCHATAZLE v. STATE OF NEW YORK

No. 10066

(Dated May 19, 1916)

Claim for Personal Injuries Alleged to Have Been Sustained by Falling from
a Canal Bridge.

Claimant sought to recover damages for personal injuries sustained at night by falling off the north side of the canal bridge where there was no railing. He was walking in the driveway and not in the walkway provided for foot passengers. For ten years he had been constantly using this bridge knowing that there was no barrier on the north side, and that there was a walk for foot passengers properly guarded on the other side.

The Court held that he was guilty of contributory negligence in deliberately choosing to take the roadway provided for vehicles where there was some risk, instead of taking the walkway provided for foot passengers which was safe.

The claim was dismissed.

* Subsequently the Court of Claims awarded claimant the sum of \$66.45 for the damages to claimant's property in the year 1900, but dismissed the claim as to the damages alleged to have been sustained in the year 1901.

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CLAIM against the State of New York for damages for personal injuries received while crossing a canal bridge.

Jeremiah F. Connors, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

WEBB, J.— The claimant seeks to recover damages for personal injuries received by him at Durhamville, in the town of Verona, Oneida county, on the 6th day of April, 1910, by falling from what is called the Kellar's bridge, crossing the Erie canal and forming a part of the highway.

Proof showed the claimant at the time of the accident had been a resident of Durhamville about ten years, living north of the bridge and east of the canal; that he crossed this bridge constantly and understood its construction; that there was a walk for foot passengers on the south side of the bridge four feet in width and a driveway sixteen and one-half feet in width, on the north side of which was the truss elevation with its vertical posts and diagonal tie rods. There was no horizontal rail or guard on the north side of this bridge except a four by four beam fixed on the roadway close to the supports of the truss. A foot path led to the foot passageway of the bridge on each side.

On the night of the accident it was dark, a slight rain had fallen and the path was somewhat slippery. About nine o'clock claimant was returning from his church and crossed the bridge to his home when he turned back to go to the hotel, walking in the driveway. He heard, though he did not see, a wagon approaching and stepped to the north side of the bridge for safety and fell a distance of more than twenty feet to the bed of the canal, receiving injuries which kept him from his work for six weeks. His right shoulder was severely injured and still troubles him in wet weather, but he has practically regained the use of his arm. It appeared that the bridge in question was the standard type of bridge formerly erected by the State, of which some three thousand are still in use, and was known as a Whipple bridge. So far as appeared no accident had ever occurred on this bridge.

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It is unnecessary to decide whether or not the State was negligent in maintaining this bridge without providing a railing or barrier on the north side. To recover damages the claimant must show himself free from negligence contributing to his injuries. For ten years he had been constantly using this bridge knowing there was no such barrier on the north side, and that there was a walk for foot passengers properly guarded on the other side of it. He had the choice to take the walkway provided for foot passengers, which was perfectly safe, or the roadway provided for vehicles with some attendant risk. He deliberately chose the latter, and in so doing I am of the opinion that he was guilty of contributory negligence and his claim should be dismissed.

PATRICK H. MURRAY v. STATE OF NEW YORK

No. 2560-A

(Dated May 31, 1916)

Claim for Damages on State Highway Contract.

The claimant, a contractor on a highway, sought to recover the cost of iron pipe, placed on the work pursuant to the written directions of the engineer in charge of the work but not used. The contractor could not sell the pipe and the State would not pay for it, justifying its refusal by the following provision in the contract: "The said work shall be performed in accordance with the true intent and meaning of the plans and specifications therefor, which are hereby referred to and made a part of this contract, without any further expense of any nature whatsoever to the state than the consideration named in this contract. The state, however, reserves the right to make such additions, deductions or changes as it deems necessary, making an allowance or deduction therefor at the prices named in the proposal for this work, and this contract shall in no way be invalidated thereby; and no claim shall be made by the contractor for any loss of anticipated profits because of any such change, or by reason of any variation between the approximate quantities and the quantities of the work as done."

The Court held that the changes made by the engineer were "deductions;" that the contractor's agreement not to claim anticipated profits left the way open for him to claim such damages as he might suffer from the deduction, exclusive of anticipated profits; that he was not suing for the pipe at \$30 per ton, which would include such profits, but was asking simply to be

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reimbursed for his disbursements incurred under the engineer's directions; and that under the contract he had not waived his right to recover for such disbursements.

CLAIM against the State of New York for iron pipe furnished by contractor.

Ainsworth & Sullivan, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

WEBB, J.— The only difference between the parties to the highway contract No. 5446 for the construction of the Interlaken-Trumansburg highway arises over deductions made by the division engineer in the work. Thirty-six feet of pipe were delivered at station 633 for a culvert which later was eliminated; and at station 490 a pipe was cut off six feet by the engineer's orders. This pipe aggregated three and twenty-eight one-hundredths tons, had been placed on the work by the contractor pursuant to the written directions of the engineer, and when so delivered had cost the contractor eighty-three dollars and thirty-one cents. The contractor could not sell the pipe and the State would not pay for it, justifying its refusal by the following provision in the contract:

" 4. The said work shall be performed in accordance with the true intent and meaning of the plans and specifications therefor, which are hereby referred to and made a part of this contract, without any further expense of any nature whatsoever to the state than the consideration named in this contract. The state, however, reserves the right to make such additions, deductions or changes as it deems necessary, making an allowance or deduction therefor at the prices named in the proposal for this work, and this contract shall in no way be invalidated thereby; and no claim shall be made by the contractor for any loss of anticipated profits because of any such change, or by reason of any variation between the approximate quantities and the quantities of the work as done. It is further agreed that any increase in quantities or extra work

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performed or extra material furnished shall be covered by a supplemental contract as provided in chapter 30 of the Laws of 1909 and the amendments thereto, and that no claim will be made by the contractor for any such items performed or furnished before such supplemental contract shall have been approved by the comptroller of the state of New York and executed by the commissioner of highways as provided by chapter 342 of the Laws of 1913 and amendments thereto."

The changes made by the engineer were clearly "deductions" and the question presented is whether the contractor is precluded from a recovery because of the clause of the contract above cited.

Obviously it was in the minds of the parties that the State might make such changes in the contract either by way of additions or deductions as it deemed necessary without invalidating the agreement, and with corresponding allowances or deductions as the case might be. If additional work, quantities or material were to be furnished it was agreed that a supplemental agreement should be made before any claim could lawfully be made against the State. If deductions were ordered it was agreed that "no claim shall be made by the contractor for any loss of anticipated profits because of any such change."

The construction contended for by the State can only be upheld by ignoring the words, "for the loss of anticipated profits." Standing as they do the contractor's agreement was that if the State made changes and deductions he would not claim anticipated profits on the work eliminated. He nowhere agreed that he would not claim reimbursement for moneys expended in carrying out the engineer's written orders. On the theory of the State the engineer might have eliminated all the pipe at any time before it had been placed as called for by the contract and the contractor would be without redress.

By the accepted rules of construction his agreement not to claim anticipated profits left the way open to claim such damages as he might suffer from the deductions, exclusive of anticipated profits, and that is precisely what he does in this proceeding. He was

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to receive thirty dollars per ton for his iron pipe when in place as called for in the contract. He does not sue for the pipe at thirty dollars per ton, which would include such profits, but he asks to be reimbursed for his disbursements incurred under the engineer's direction, a claim which is certainly just, and in my opinion was not waived by anything in his contract.

Ordered accordingly.

WILLIS G. KNIGHT and HORACE D. KNIGHT, as Executors of the
Estate of HORACE W. KNIGHT, deceased, v. STATE OF NEW
YORK

No. 2209-A

(Dated July 22, 1916)

Claim by Executors for Damages Resulting From the Permanent Appropriation of Land for the Barge Canal.

An award was made for the land appropriated and for three small frame buildings on the land. The Court held, however, that the evidence was insufficient to justify an award for the loss of a mineral spring on the land and two gas wells. The proofs as to the successful operation of the business of selling mineral water were very unsatisfactory; furthermore, the decedent had before the appropriation made a gift of the mineral spring to a son, since deceased, and if there had been any profit in the operation of the mineral spring it did not belong to the claimants. As to the gas wells, a consideration of the entire testimony showed that little, if any, gas had been used from the wells at the time of the appropriation.

CLAIM against the State of New York for damages for the appropriation by the State of premises upon which were three small frame houses, a mineral spring and two gas wells.

Hogan & Byrne, for claimants.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

WEBB, J.— Upon the trial of this action it appeared the premises appropriated were occupied by three small frame houses, for

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which houses with the land appropriated, an award is made of \$3,000. Claimants made proof of the total loss of a mineral spring which they claimed was worth \$5,000 and two gas wells alleged to be of the value of \$50,000, for which no award is made. The proofs as to the successful operation of the business of selling mineral water were very unsatisfactory, and, in my judgment, insufficient to justify an award. Furthermore, the proofs showed the decedent made a gift of that mineral spring to a son, since deceased, and if there was any profit in the operation of the mineral business it did not belong to the claimants.

No award has been made for the gas wells. While the appropriation was made on the 24th day of November, 1914, the proofs on the part of the claimants were to the effect that their entire factory with two dwelling houses had been supplied by gas taken entirely from these wells for many years prior to the appropriation and down to the last-mentioned date, and no artificial gas had been used for that purpose down to the appropriation. The State's proofs showed that artificial gas had been supplied from a neighboring village for the use of that factory continuously for four years and upwards preceding the appropriation. A careful consideration of the entire testimony shows that little, if any, gas was used from the wells at the time of the appropriation, and consequently no award was made for the gas wells.

Fennell and Paris, JJ., concur.

FELICE PASSORELLI and TRESA PASSORELLI v. STATE OF NEW YORK

No. 528-A

(Dated August 18, 1916)

Claim for Damages Resulting From the Permanent Appropriation of Land.

Claimants owned land adjoining a roadway known as the Butts road, their title running to the center of the highway. The appropriation was for the

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purpose of an approach to a new bridge over the Barge canal. The new approach shut off the former access to claimants' house and barn. The new construction also closed two conduits which had formerly diverted water from the claimants' premises, and water flowed down upon the claimants' premises from the embankment of the approach during every rain. The Court made a total award of \$750 for all the damages resulting to the claimants from the appropriation.

CLAIM against the State of New York for damages to claimants' lands resulting from the appropriation of land for an approach to a new bridge over the Barge canal and from the construction of this approach.

Signor & Signor, for claimants.

Egburt E. Woodbury, Attorney-General (Harry N. Ehle, Deputy Attorney-General), for State.

WEBB, J.— The premises appropriated by the State, for which this claim is filed, consist of one hundred and thirty-six one thousandths of an acre of land, being contract No. 62, parcel No. 3440. A considerable portion of the appropriation is the claimants' title to the center of the roadway known as the Butts road, adjoining claimants' premises on the east.

The buildings upon the land appropriated were of slight value, placed by the claimants' witnesses at \$300, and the State's witnesses at \$100, in my judgment of no greater value than \$150.

The appropriation was for the purpose of a roadway to the new canal bridge. Prior to the appropriation the approach to this bridge began at the claimants' house, and was of comparatively a slight grade. The construction of the new approach to the bridge made the roadway twelve feet higher than the old approach, substantially on the level with the second story of claimants' house, and shut off the former access to their house and barn, greatly to claimants' inconvenience and to the serious damage to their property.

Further, it appeared by the uncontroverted evidence that at

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the time of the appropriation two conduits existed under the Butts road as it existed prior to the appropriation, which served to drain the water from the former blue line of the canal adjoining claimants' premises on the north, and permitted such waters to continue in their natural course to the east side of the bridge where a culvert existed under the canal connecting with the ditch on the north side thereof. By the construction of the new approach these two conduits were entirely closed, and since the improvement claimants' lands on the south are constantly flooded, and water from one to eight inches in depth stands in the cellar in times of rain and flood. The northerly conduit of the two in question is shown upon the State's map of the premises, together with the culvert, and the evidence substantiating the existence is entirely uncontradicted on the record.

The acquisition of the claimants' rights in that roadway has resulted in water standing upon a considerable portion of their premises and in the cellar of the house, with streams of water flowing down the sides of the embankment upon claimants' premises during every rain, and depriving the claimants of light, air and view from the east side of their house.

The value of claimants' premises prior to the appropriation was placed by the witnesses at \$1,600 with substantial unanimity. Claimants' witnesses thought their damages were \$1,000 or more, and the State's witnesses estimated them at \$400. A careful review of the evidence presented, and a thorough examination of the premises leads me to the conclusion that claimants' damages for the buildings appropriated were \$150, and for the land appropriated, including the conduits and the change of grade on the highway, and the resulting damage to claimants' property to the date of this award, the sum of \$600, making a total award of \$750.

Quinn v. State of New York

PETER J. QUINN v. STATE OF NEW YORK

No. 1569-A

(Dated September 14, 1916)

Claim for Salary.

This is a claim against the State for the sum of \$150 for services rendered the State in the month of April, 1914, by the claimant as special agent to the State Board of Tax Commissioners. In July, 1913, he was employed by the commission as such agent at an agreed salary of \$150 per month. He received his pay to and including April 9, 1914, when his services were dispensed with. The check for \$45 which the commission sent him to pay for the nine days in April, 1914, he promptly returned and notified the commission each day in that month that he was ready to perform work for the commission, if it would assign any to him.

The Court, construing certain correspondence between the claimant and the commission, held that the contract of hiring set forth in the correspondence was for what is known as a general and indefinite term, and that under such a contract the employee is liable to be dismissed by his employer at any time without previous notice and that his compensation ceases on the date of his dismissal. The claimant's recovery was therefore limited to \$45.

CLAIM against the State of New York for services rendered under an agreement at a stipulated sum per month where claimant had been dismissed within that period and was tendered pay for less than one month.

William O. Shields, for claimant.

Egburt E. Woodbury, Attorney-General (Harry W. Ehle, Deputy Attorney-General) for State.

ACKERSON, P. J.— This is a claim against the State for \$150 for services rendered the State in the month of April, 1914, by the claimant as special agent to the State Board of Tax Commissioners. The facts proven upon the trial were as follows: In the month of July, 1913, the claimant was employed by the State Board of Tax Commissioners as such agent at the agreed salary of \$150 per month. The hiring of claimant was consummated by the following correspondence:

Opinion by Ackerson, P. J.

" William H. Sullivan, Norwich. Joseph S. Schwab, New York.

" Thomas F. Byrnes, Brooklyn, Chairman.

" Joseph B. Cunningham, Secretary.

" Charles J. Tobin, Asst. Secretary.

" STATE OF NEW YORK

" STATE BOARD OF TAX COMMISSIONERS

" ALBANY, *July* 11, 1913.

" P. J. QUINN, Esq.,

" 85 West Avenue,

" Buffalo, N. Y.:

" DEAR SIR.— I have been directed by the Chairman to notify you that at a meeting held by the State Board of Tax Commissioners on July 10, you were appointed to the position of special agent, and are hereby requested to report for duty at this office on the morning of July sixteenth.

" Very truly yours,

" JOS. B. CUNNINGHAM,

" *Secretary.*"

" William H. Sullivan, Norwich, Joseph S. Schwab, New York.

" Thomas F. Byrnes, Brooklyn, Chairman.

" Joseph B. Cunningham, Secretary.

" Charles J. Tobin, Assistant Secretary.

" STATE OF NEW YORK

" STATE BOARD OF TAX COMMISSIONERS

" ALBANY, *July* 19, 1913.

" MR. P. J. QUINN,

" 85 West Avenue,

" Buffalo, N. Y.:

" DEAR SIR.— The State Board of Tax Commissioners begs to advise you that you have been appointed a confidential special agent in this Department at a salary of \$150 per month to take effect July sixteenth and you are hereby ordered to report at the office of the County Clerk of Buffalo, to Mr. Owen McManus on July twenty-first. Mr. McManus is at present making certain

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investigations in connection with the equalization of special franchise property in the various towns of Erie county.

“ Very truly yours,
“ STATE BOARD OF TAX COMMISSIONERS,
“ C. J. TOBIN,
“ *Assistant Secretary.*”

“ William H. Sullivan, Norwich. Joseph S. Schwab, New York.
“ Thomas F. Byrnes, Brooklyn, Chairman.
“ Joseph B. Cunningham, Secretary.
“ Charles J. Tobin, Assistant Secretary.

“ STATE OF NEW YORK
“ STATE BOARD OF TAX COMMISSIONERS
“ ALBANY, *July 31, 1913.*

“ Mr. P. J. QUINN,
“ 85 West Avenue,
“ Buffalo, N. Y.:

“ DEAR SIR.— The State Board of Tax Commissioners acknowledges the receipt of your letter of July 23rd, concerning the amount of your salary.

“ In reply would say you are advised that the same has been fixed by the Board at \$150 per month; that the Board has no information that it was to be any more and that there is no error in any way concerning the amount thereof.

“ Yours very truly,
“ STATE BOARD OF TAX COMMISSIONERS,
“ THOMAS F. BYRNES,
“ *Chairman.*”

“ 85 WEST AVENUE, BUFFALO, N. Y., *July 14, 1913.*
“ Hon. JOSEPH B. CUNNINGHAM, Secretary,
“ State Board of Tax Commissioners,
“ Albany, N. Y.:

“ DEAR SIR.— Your favor of July 11, 1913, notifying me of my appointment to the position of Special Agent to your Honorable Board received, and in reply would kindly ask you to convey my

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sincere thanks for the same, and that I will endeavor to be present at your office on the 16th, as requested.

“Knowing that the Honorable Board will never regret my appointment, and that our relations will always be pleasant and satisfactory, with best wishes, I beg to remain.

“Yours very truly,
“P. J. QUINN.”

The contract of hiring which the foregoing correspondence constitutes was terminated, as claimed by the State, by the following communication:

“William H. Sullivan, Norwich. Joseph S. Schwab, New York.

“Thomas F. Byrnes, Brooklyn, Chairman.

“Hon. JOSEPH B. CUNNINGHAM, Secretary,

“Charles J. Tobin, Assistant Secretary.

“STATE OF NEW YORK

“STATE BOARD OF TAX COMMISSIONERS

“ALBANY, *April 8, 1914.*

“Mr. PATRICK J. QUINN,

“c/o County Clerk's Office,

“Lowville, N. Y.:

“DEAR SIR.—You are hereby notified that at a meeting of the State Board of Tax Commissioners held on this date it was decided to dispense with your services as special agent in this department, and that said services will be discontinued and terminated at the close of business April 9, 1914.

“Very truly yours,

“JOS. B. CUNNINGHAM,

“*Secretary.*”

The only question involved in this case is whether the contract of hiring above set forth constituted a definite employment by the month, and whether the claimant, therefore, should not receive pay for the full month in which his services were dispensed with, as claimed by him.

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The claimant received his pay while working as such agent at \$150 a month from the time he was employed up to and including the 9th day of April, 1914. The check for \$45 from the Commission which was to pay him for the nine days in April, 1914, he promptly returned, and notified the Commission each day in that month that he was ready to perform work for them if they would assign any to him. The contract of hiring as set forth in the foregoing correspondence was for what is known as a general and indefinite term, and under such a contract the employee is liable to be dismissed by his employer at any time without notice and his compensation to cease on the date of his dismissal. The \$150 per month mentioned does not mean that he must be allowed to finish any month at that rate, but it only means that he shall be paid at the rate of \$150 a month for the time which he actually serves in such employment. This precise proposition has been very definitely and specifically decided by the Court of Appeals in the cases of *Edward Martin v. New York Life Insurance Company*, 148 N. Y. 117, and *Watson v. Gugino*, 204 id. 535.

Fennell and Webb, JJ., concur.

FRANK S. O'NEIL v. STATE OF NEW YORK

No. 2763-A

(Dated September 14, 1916)

Claim for Salary.

Frank S. O'Neil, the claimant, was appointed a member of the Athletic Commission of this State on or about July 26, 1911, and continued as such up to October 8, 1915. In the latter year chapter 680 of the Laws of 1915 was enacted, taking effect May 22, 1915, providing that "Each member of the commission shall be entitled to receive an annual salary of three thousand dollars and his actual necessary traveling and other expenses incurred by him in the performance of his official duties." The Legislature, however, failed to make any appropriation to pay these salaries except an appropriation of \$9,000 for salaries commencing October 1, 1915. The question here involved is as to the right of the claimant to draw a salary for the period from May 22, 1915, to October 1, 1915.

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The Court held that when the State, by statute, provides that an official shall receive a salary, that creates a specific and express contract between the State and that official, and is an obligation which cannot be avoided by the State simply because afterwards the Legislature either fails, neglects or refuses to make an appropriation to pay that salary. Claimant was therefore held to be entitled to an award for salary at the rate of \$3,000 per annum from and including the twenty-second day of May, 1915, to the first day of October, 1915.

CLAIM against the State of New York by Frank S. O'Neil, as member of the Athletic Commission of this State, for salary.

Henry D. Patton, for claimant.

Egburt E. Woodbury, Attorney-General (Archie C. Ryder, Deputy Attorney-General), for State.

ACKERSON, P. J.—On or about the 26th day of July, 1911, the above named claimant, Frank S. O'Neil, was appointed a member of the Athletic Commission of this State and continued to act as such down to October 8, 1915. At the time of his appointment no salary was provided for the Commissioners.

By chapter 680 of the Laws of 1915, which took effect May 22, 1915, it was provided that "Each member of the commission shall be entitled to receive an annual salary of three thousand dollars and his actual necessary traveling and other expenses incurred by him in the performance of his official duties." No appropriation, however, was made by the Legislature to pay the salaries of those Commissioners, except an appropriation of \$9,000 for their salaries commencing October 1, 1915.

Claimant contends that inasmuch as he was a Commissioner in the performance of his duties when the law took effect providing for a salary, that he should commence to draw a salary from that time. We believe the claimant's contention is well founded. The State contends that this court has no jurisdiction to hear and determine this claim, for the reason that the claim has heretofore been submitted to the Comptroller of the State of New York for his audit and by him disallowed. We do not agree with the learned Attorney-General that this is the case. The payroll of

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the said Commission was submitted, it is true, to the Comptroller not for audit and determination, so far as this salary was concerned, but for payment, and the Comptroller did not endeavor to audit or determine the claimant's claim for salary upon its merits nor make any ruling as to its legality, but, as is clearly shown by his letter of October 7, 1915, attached to the stipulation of the facts in this case, simply refused to pay the salary because the Legislature had failed to appropriate any funds for the same. The tenor of the Comptroller's letter is rather an admission of the validity of claimant's claim, and that the only reason for not paying it by him was that he did not have any money to pay it with.

Chapter 680 of the Laws of 1915, above mentioned, which provided that these Commissioners should have a salary of \$3,000 per year, became a law the 22d day of May, 1915. The State became liable from that time to pay that salary to these Commissioners, provided there were any such Commissioners in office and duly acting at that time. The claimant then was a Commissioner, performing his duty as such, and he cannot be denied this salary which the law plainly provides that he shall receive, unless it can be spelled out from the act that the provision relating to salary was to apply only to the new Commissioners to be appointed or was to be effective only in the event that an appropriation should be made therefor. We find nothing in the statute which contemplates either of those contingencies, but the provision relating to salaries is plain and unqualified, that the Commissioners should receive a salary of \$3,000 a year, and no date being mentioned in the statute when that provision should go into effect, it must have gone into effect when the law became operative as a statute of this State, on the 22d day of May, 1915.

It is apparent that when the State declares in the most solemn manner which it is possible for it to do, by act passed by the Legislature and signed by the Governor, that a certain official shall receive a salary, that creates a specific and express contract between the State and that official, and an obligation which cannot be avoided by the State simply because afterwards the Legislature

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either fails, neglects or refuses to make an appropriation to pay that salary. If this is not the case in any law creating an office and providing a salary, where an officer has performed his duties under the law providing for his appointment and for his salary, it is absolutely meaningless and no public officer would know whether he was to have any salary or not until sometime perhaps in the future when the Legislature should pass an appropriation bill. Then only could he determine whether or not he was to receive any salary.

We believe that there is ample judicial authority to sustain the contention of the claimant in this case. See *Fisk v. Jefferson Police Jury*, 116 U. S. 131; *Johnson v. Hudson River Railroad Company*, 49 N. Y. 455; *People v. Butler*, 147 id. 164; *Young v. City of Rochester*, 73 App. Div. 81; *People ex rel. Smith v. Trustees*, 11 id. 108; *Green v. Purnell*, 12 Md. 333; *State v. Weston*, 4 Neb. 216; *Riggs v. Brewer*, 64 Ala. 282.

The claimant, therefore, is entitled to an award in this case for salary at the rate of \$3,000 per annum from and including the 22d day of May, 1915, to the 1st day of October, 1915.

Fennell and Webb, JJ., concur.

Ordered accordingly.*

JAMES Y. GATCOMB v. STATE OF NEW YORK

No. 1636-A

(Dated September 16, 1916)

Claim for Injuries to a Race Horse at the State Fair at Syracuse.

The claimant, an owner and trainer of race horses, at the invitation of William H. Jones, a State Fair Commissioner, who represented the commission and the State as superintendent in charge of the State Fair grounds at Syracuse, and of Henry S. Nealey, racing secretary of the State Fair Commission, brought his horses to the State Fair grounds to train and race them there. His attention was attracted to some buildings which were to be

* The judgment of the Court of Claims was unanimously affirmed by the Appellate Division, Third Department, without opinion. 177 App. Div. 941.

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moved across the race track, but upon calling the attention of Jones to this proposed obstruction of the race track and its dangers, the latter assured him that he would see to it that the track was not obstructed while the claimant was training his horses and that the buildings would be moved when the claimant did not wish to use the track. The claimant, relying upon these statements and promises, went ahead with his training. On June 23, 1913, he was engaged in driving one of his horses called Gay Audobon, a race horse conceded to be of great speed and value, around the track when the moving contractor, an independent contractor, was permitted, without claimant's knowledge, to stretch a cable across the track for the purpose of pulling a building across it. The claimant while driving Gay Audobon at great speed ran into the cable, injuring the horse and sulky and throwing the claimant to the ground.

The Court held that even in the absence of any agreement, the State owed the claimant at least the same duty which a municipality owes to the traveler upon the public streets, and that this principle should be applied with special rigor under the circumstances of this case.

The Court held further that the claimant did not in this case have to depend for redress upon the above principle of law, but was entitled to recover because of his express understanding with Jones that the track would be kept free from the very obstruction which caused the injury; that the said State Fair Commissioner, representing the State, absolutely failed and neglected to keep his promise to the claimant, and as the direct result of such failure the claimant's horse and sulky were injured; and that the only question to determine was the amount of damages to which claimant was entitled.

The Court allowed the claimant \$159 for the damage to the sulky. Being unable to race his horse in the Grand Circuit that year, he was allowed to recover \$1,675 which he had paid in entrance fees. The rule of damages for the injury to the horse was held to be the difference in its market value before and after the injury, which from the evidence was placed at \$11,000, making a total award of \$12,834.

CLAIM against the State of New York for injuries sustained to a race horse at the State fair racetrack at Syracuse.

Northrup, Tooke, Lynch & Carlson, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

ACKERSON, P. J.—It appears from the evidence in this case that the claimant was the owner and trainer of trotting horses; that he was the owner of a horse called Gay Audobon, that had trotted a mile in 2:03¾ minutes, and which it was thought would become one of the fastest trotting horses in the world; that said

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Gatcomb, in the fall of 1912, was invited by William H. Jones, a State Fair Commissioner, and Henry S. Nealey, then racing secretary of the State Fair Commission, to bring his horses to the State Fair grounds at Syracuse the following year to train and trot them there. It appears also that the State of New York maintains on its fair grounds in the city of Syracuse one of the best racetracks in the country, and one of the principal events of the State Fair is the racing upon this track. The higher the grade of race horses secured for participation in these races by the State Fair Commission the greater the inducement, of course, for the public to attend and witness the spectacle, and also the greater the income to the State. It further appears that in response to the invitation of said Jones and Nealey the claimant herein, James Y. Gatcomb, came to Syracuse with his horses in May, 1913, and proceeded to train them upon the State Fair grounds; that the said Jones was then superintendent in charge at the State Fair grounds representing the Commission and the State; that he assigned said Gatcomb quarters thereon, and told him that he might train his horses on Mondays and Thursdays, and that the track would be kept in shape for him, and that he would see that the same was not obstructed in any way; that other trainers were training their horses during the same time, but on different days; that soon after coming to the State Fair grounds claimant's attention was attracted to some buildings which were to be moved, and upon inquiring of the said Jones about the matter he found that said buildings were to be moved into and across the racetrack. He spoke to Jones about this proposed obstruction of the racetrack and of its dangers, and Jones assured him in positive language that he would see to it that said track should not be obstructed while he was training his horses, and that said buildings should be moved afternoons or other times when he, Gatcomb, did not wish to use the track; that he, Gatcomb, need not worry about it at all; that he should go ahead and train his horses on Mondays and Thursdays, and if necessary the moving contractor must wait until he had finished training his horses. Gatcomb, believing Jones' statements, and relying upon what he said, went ahead with his training, and

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upon the 23d day of June, 1913, after he had driven five times around the track, and between the fifth and sixth heat on that day, this moving contractor, who was an independent contractor, or somebody in his employ, was permitted to stretch a cable across the track for the purpose of pulling a building across the track, which cable was attached to a windlass on the side of the track opposite from the building, all unbeknown to Gatcomb until he arrived within 100 or 150 feet of the same, driving his horse at a very high rate of speed, when he was unable to avoid the cable and the horse was severely injured as well as his racing sulky, and Gatcomb was thrown from the sulky to the ground, by coming in contact with the cable.

First. The claimant under this state of facts, as developed by the evidence in this case, cannot be accused of any contributory negligence. He did everything he could to avoid the obstruction on the track when he saw it, and he did everything he could before that to be assured that there would be no obstruction on the track by calling the attention of the one in charge of the track to this probable obstruction, and he was assured in positive terms that no such obstruction would be allowed, and that the track would be kept absolutely clear.

Second. The State of New York maintained this racetrack, and invited owners of valuable racing horses to come there and train them. It owed to such trainers, therefore, the same duty which a municipality owes to the traveler upon the public streets. It owed even a greater duty to these trainers than the municipality owes to the traveler upon the public streets, from the very nature of the case. Here upon this track horses of great value were to be driven at great speed. It is apparent, therefore, that any obstruction of this track would be of the greatest danger to life and limb; that any obstruction of the track would be liable to cause the death of the horse or the driver, and that if there was to be any obstruction of the track the State must be held to be absolutely bound to see that every trainer who had come to those grounds with its consent for the purpose of training his horses, there at the invitation of the State, and in order to make an attraction which would accrue to the benefit of the State, must

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have notice and full information of such obstruction, so that he would be sure to avoid the track at such times. This, in the view of the court, was the obligation of the State, without any specific or special agreement in relation to the same. Without any special or specific agreement in relation to the same, the case is analogous with the case of a traveler upon a public street injured through the act of an independent contractor. The law which the Court of Appeals laid down in the case of *Storrs v. City of Utica*, in 17 N. Y. 104, and which has been followed by a long line of decisions, is the same principle which applies here, except, as the court has above indicated, that principle should be applied here in a case where the State is maintaining a racetrack where horses are to be driven at a high rate of speed a great deal more rigorously, if that is possible, than it should be applied to the case of an injury in a public street. Therefore, even though there had been no contract or agreement or talk between the State Fair Commission and this claimant about keeping the track free from obstructions, the State would be liable to the claimant for what damages he suffered by reason of this injury.

Third. But in this case the claimant does not depend for redress upon the principle of law above stated, but he depends for his redress upon the fact that he had a distinct, unqualified and specific understanding with the member of the State Fair Commission who was the then superintendent and in charge of the State Fair grounds that this track on the particular forenoon in which his horse was injured should be kept free from the particular obstruction which did cause the injury. The attention of the said superintendent, William H. Jones, was called to the fact that these buildings were about to be moved across the track, and it was then that he stated to the claimant that he would see that they should not interfere with his training in any manner whatever. Then, regardless of any other principle of law, the State became absolutely bound to keep this track clear and free from this specific obstruction to which its attention had been called, and which it had guaranteed should not in any manner interfere with the track or with the training of the horse in question thereon. The claimant relied upon this promise and agree-

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ment of the State through its State Fair Commissioner, as he had a right to do. The said State Fair Commissioner, representing the State, absolutely failed and neglected to keep his promise to the claimant, and as the direct result of such failure the claimant's horse and sulky were injured in the manner above set forth.

The only question, therefore, in this case to determine is the amount of damages to which the claimant is entitled. He is entitled to damages to the sulky in the sum of \$159. Being unable to race his horse in the Grand Circuit that year, for which he had paid \$1,675 entrance fees, he clearly should be reimbursed for that. The difficult question for the court is to determine what damage he should be allowed for this horse and how to determine it. In the case of *Reed v. Rome, Watertown & Ogdensburg Railroad Company*, 16 N. Y. St. Repr. 58, 48 Hun, 231, the court laid down the rule of damages in a case similar to this. There plaintiff's trotting horse was injured in being transported by said railroad company. On the trial the plaintiff was permitted to prove by the opinion of witnesses the value of the mare both before and after her injury. The court also permitted him to prove her speed and value assuming that she possessed that speed. Adopting that rule in this case, we are of the opinion that this horse was fairly and reasonably worth immediately before his injury the sum of \$15,000, and there is no evidence in the case to show that at any time since the injury said horse has been or is worth more than \$4,000. The damage to the horse, therefore, under this rule, would be \$11,000, which, together with the damage to the sulky and the damage for entrance fees, would amount to the sum of \$12,834. We think that the claimant is fairly and justly entitled to an award for this amount, on the law and the facts in this case.

Fennell, J., concurs.

Award accordingly.*

* The judgment of the Court of Claims was unanimously affirmed by the Appellate Division, Third Department, without opinion. 178 App. Div. 941.

Opinion by Webb, J.

CHARLES E. McDONALD, as Administrator, etc., of JAMES W.
McDONALD, Deceased, v. STATE OF NEW YORK

No. 1178-A

(Dated September 19, 1916)

Claim for Personal Injuries Resulting in Death.

The claimant's intestate, about 9 P. M. on February 3, 1913, attempted to board a car on Main street in the city of Lockport to go to Buffalo. The car failed to stop and he followed it to where it passed on to the large bridge which the State was building across the Barge canal at Main street, and while still following it he fell through a large hole in the bridge, dropping fifty feet to the rocks below where he met his death.

From a consideration of the evidence the Court held that the State in the construction of the bridge had failed in its duty to guard the excavation in such a manner as to make the bridge reasonably safe for travelers, and that the claimant's intestate was not guilty of contributory negligence in assuming that he might lawfully travel a highway upon which a surface car was proceeding safely a few feet ahead of him.

CLAIM against the State of New York for personal injuries resulting in death from the failure of the State to properly guard a highway bridge while in process of construction.

Van Gorder, Holt, Hickey & Craine, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

WEBB, J.—The proofs in this action show that the deceased, who was a resident of Buffalo, on February 3, 1913, went over to the neighboring city of Lockport, and about 9 o'clock P. M., the next day attempted to board a surface railroad car to return to his home. He waited on the sidewalk at the corner of Main and Cottage streets, and when a west bound car came along he stepped out to the middle of Main street for the purpose of boarding it, the car passed him without stopping and so he followed to catch it. The car had then left the pavement on Main street and was on the bridge, and he, following, fell into a large hole, through the bridge, dropping fifty feet on the rocks below where he met his death.

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The proofs showed that the agents of the State were constructing a large bridge across the Barge canal at Main street; that the structural portion of the bridge had been pretty well completed, but it had not been covered with pavement on the north side of the tracks crossing on the bridge, and on the north side there existed some openings which were wholly unprotected. It was in one of these holes, just at the east side of the bridge where it met the pavement, that the deceased fell. A fence had been constructed in the highway on the north and south sides of the single track of the railway where it met the highway on the south side of the bridge, the railroad track was diagonally across the bridge and not at right angles, and where it met Main street on the south side there was an open way some twelve feet wide left for the passage of the cars from the pavement on to the bridge. Red lights were provided and hung from the fence, both on the north and south sides of this opening where the tracks were laid, but there was no guard or obstruction of any kind to prevent travelers from following the line of track from Main street to the bridge, and the street at that particular point was very dimly lighted.

It was urged upon the trial that the existence of the fence and lights on each side of this railway opening to the bridge was a sufficient warning to travelers of the dangerous nature of the locality, and that the fact that the claimant ran after the car as it proceeded to the bridge, taken in connection with the lights, fence and debris, showed conclusively his contributory negligence within the requirement of the statute.

I do not think so. It was the duty of the State in the construction of this bridge to guard the excavation in such a manner as to make it reasonably safe for travelers. Had there been no bridge there it could hardly be claimed that the State had properly guarded the excavation if it had left a twelve-foot opening in the fence unlighted, with nothing to prevent a traveler from walking into the excavation. It did leave such an opening in the fence after the bridge had been practically constructed, but before it had been floored, and almost at the point of contact between the highway and the bridge it left spaces or holes, where the flooring of the bridge should have been, sufficient in size to imperil travelers.

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No watchman guarded this entrance to the bridge, no electric lights illuminated the dangers of the locality, no movable obstruction had been provided, it was open to everyone so far as the proofs showed. The claimant was wholly unfamiliar with the situation. He followed the car as it rolled on to the bridge and being immediately behind it attempted to reach the door of the car. I fail to see where he was negligent in assuming that he might lawfully travel a highway upon which a surface car was proceeding safely a few feet ahead of him.

It appeared that the place of this accident was constantly traveled, four or five side streets centered at this point, and the open spaces were some two acres in extent. The situation called for a movable barrier at the point of contact with the bridge and Main street, or a watchman to protect travelers.

The facts show negligence on the part of the State, and following the decision in *Chisholm v. State of New York*, 141 N. Y. 246, it must be held liable for the consequences of its negligence.

Ackerson and Fennell, JJ., concur.*

GEORGE S. WRIGHT v. STATE OF NEW YORK

No. 3023

(Dated September 19, 1916)

Claim of Lock-tender for Overtime Pay.

In 1893 and 1894 the claimant was a lock-tender on the Erie canal at a monthly salary of \$42.50. He worked twelve hours a day and now claims that under chapter 385 of the Laws of 1870, being an act to regulate the hours of labor of mechanics, workmen and laborers in the employ of the State, he was entitled to pay for overtime, that the \$42.50 a month which he received was simply pay for a month's work composed of days of eight hours each instead of twelve hours, and therefore he is now entitled to \$21.25 per month in addition to what he has already received.

The Court upheld the contention of the claimant on the authority of

* The judgment of the Court of Claims was unanimously affirmed by the Appellate Division, Third Department, without opinion. 178 App. Div. 943. The appeal taken by the State to the Court of Appeals was dismissed by the Court of Appeals in July, 1917.

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McCammon v. State of New York, 12 Court of Claims Reports 20, affirmed in 117 App. Div. 913.

The State contended that lock-tenders cannot be considered mechanics, workmen or laborers within the purview of the above statute. The Court, however, held that the word "workmen" is sufficiently broad in scope to include lock-tenders receiving \$42.50 per month.

CLAIM against the State of New York for moneys alleged to be owing to claimant as lock-tender.

Richard Hurley, for claimant.

Egburt E. Woodbury, Attorney-General (Michael H. Quirk, Deputy Attorney-General), for State.

ACKERSON, P. J.— The claimant herein was a lock-tender at lock 39 on the Erie canal in or near Little Falls in the county of Herkimer, State of New York, during the season of navigation in the years 1893 and 1894. The claimant was appointed to such position by the Superintendent of Public Works of this State at the monthly salary of forty-two dollars and fifty cents. The hours of his work, as regulated by the said Superintendent of Public Works, were twelve hours each day. The claimant received his pay and signed the payroll in the regular way, without making any objection at the time. He now claims that in accordance with chapter 385 of the Laws of 1870, being an act to regulate the hours of labor of mechanics, workmen and laborers in the employ of the State, he was entitled to pay for overtime, and that the forty-two dollars and fifty cents a month which he received was simply pay for a month's work composed of days of eight hours each, instead of twelve hours, and that, therefore, he is now entitled to twenty-one dollars and twenty-five cents per month in addition to what he has already received. This precise question was raised in the case of McCammon v. State of New York, which was tried in March, 1905, before the old Court of Claims, and is reported in 12 Court of Claims, at page 20, where Judge Rodenbeck wrote the opinion of the court sustaining the contention of the claimant. The State appealed from that decision to the Appel-

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late Division, and the Appellate Division affirmed the decision of the Court of Claims, which is found reported in 117 App. Div. at page 913.

This court finds nothing in the contention now made by the State which in the opinion of the court requires it to make any different decision than was made in the case above cited. It is true that the State now contends that lock-tenders cannot be considered to be within the purview of that statute; that they are not mechanics, workmen or laborers, but they are public officers duly appointed with certain specific powers. The court is of the opinion, however, that the word "workmen" is sufficiently broad in scope to include lock-tenders who received forty-two dollars and fifty cents per month.

Fennell and Webb, JJ., concur.*

ORLEY C. TUTTLE and LOTTIE E. TUTTLE, HIS WIFE, v. STATE
OF NEW YORK

No. 2721-A

(Dated September 30, 1916)

Claim for Consequential Damages Resulting From the Appropriation of Land
for the Barge Canal.

The claimants are the owners of a farm in the city of Rome, N. Y., of about 270 acres. In June, 1908, the State appropriated a portion of this farm for the purposes of Barge canal construction and in 1909 the then special examiner and appraiser of canal lands agreed with the claimant to pay \$3,800 for the land actually taken. This agreement contained the following clause: "In this case the owner has a claim for damages by reason of cutting off certain lands from access. This damage, if any, cannot be determined until such time as further appropriations are made from same lands." On February 15, 1910, the claimants received the \$3,800 specified in the contract. No further appropriation however was made and the

* Upon appeal by the State to the Appellate Division, Third Department, the judgment of the Court of Claims was modified by reducing the same to \$141.25, and as so modified unanimously affirmed. The opinion of the Appellate Division will be found in this volume at page 331.

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years passed by without any payment from the State to the claimants for the balance of their damage and without any adjudication of the same. On October 18, 1915, the claimants filed their claim for the damages resulting to the remainder of the farm from the appropriation made in June, 1908. This claim was filed pursuant to chapter 640 of the Laws of 1915, which act took effect May 14, 1915, and which provided in part that the Court "shall have jurisdiction of and may hear and determine any claim against the State heretofore accrued which shall be filed within one year after this act takes effect for compensation or damages for or on account of the appropriation by the State of any lands" in connection with the improvement of the canals forming the Barge canal system.

The State contended that this act of the Legislature was unconstitutional as to this particular claim under article 7, section 6, of the State Constitution, and that the claimants herein could not recover because their claim accrued more than six years prior to the filing of the same. The Court, however, held that the State had recognized this indebtedness to the claimants both by the written agreement made on December 1, 1909, and by the payment of a portion of the damages which it owed the claimants on February 15, 1910, and that as the claim had been filed within six years after these dates the indebtedness would not have been barred as between citizens of the State and that therefore the claim was filed in time in this Court.

The Court held that the evidence established the fact that the farm prior to the appropriation was of the value of \$11,000, but after the appropriation it was worth not to exceed \$2,000. Of the difference, namely, \$9,000, the State had paid \$3,800, leaving a balance due claimants of \$5,200, to which they are entitled with interest from the date of the appropriation.

CLAIM for consequential damages resulting from the appropriation of land for the Barge canal.

Albert J. O'Connor, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

ACKERSON, P. J.—It appears from the evidence in this case that prior to June, 1908, claimants were the owners of a farm in the city of Rome, Oneida county, N. Y., of about 270 acres; that in the month of June, 1908, the State of New York for purposes of Barge canal construction, and in connection therewith, appropriated 35.632 acres of said farm. The claimants, therefore, were entitled to pay from the State not only for the land actually appropriated but also for whatever consequential

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damages resulted from said appropriation to the balance of their farm.

It appears that the claimants did not at that time file any claim for damages against the State, but that on or about the 1st day of December, 1909, they entered into an agreement with H. J. Donaldson, the then special examiner and appraiser of canal lands, whereby they agreed to accept and the State agreed to pay the sum of \$3,800 for the land actually taken. This agreement, which was on one of the regular printed forms used by the State for such agreements, had this clause in typewriting: "In this case the owner has a claim for damages by reason of cutting off certain lands from access. This damage, if any, cannot be determined until such time as further appropriations are made from same lands." There was considerable testimony in the case as to how that clause became inserted in the contract and the object and intent of it, and it clearly appeared that the State and the claimants understood at that time and it was their intention that the \$3,800 was only to pay for the land actually taken and that the consequential damages to the rest of the land, that is to the 235 acres not appropriated, was to be determined when a further appropriation, which was then contemplated, should be made. It appears, however, that no further appropriation was made, and the years passed by without any payment from the State to the claimants for the balance of their damage or without any adjudication of the same.

On or about the 15th day of February, 1910, the claimants received the \$3,800 specified in the contract, and from that time until the 18th day of October, 1915, they were patiently awaiting the balance of their money from the State.

Chapter 640 of the Laws of 1915 provided that "The Court of Claims shall have jurisdiction of and may hear and determine any claim against the state heretofore accrued which shall be filed within one year after this act takes effect for compensation or damages for or on account of the appropriation by the state of any lands, structures, waters, franchises, or other property in connection with the improvement of" the canals. Then the act

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refers to the different acts of the Legislature which provided for the construction of the Barge canal. This act took effect May 14, 1915. This obviated the necessity of complying with that provision of the law which provides that a claim against the State must be filed within two years after it accrues with the clerk of the Court of Claims.

The learned Attorney-General contends that this act of the Legislature is unconstitutional, and that the claimants herein cannot recover, because their claim accrued more than six years prior to the filing of the same. It is true that their claim accrued more than six years prior to the filing of the same, but the Constitution does not prohibit the Legislature from passing a law empowering the Court of Claims to hear and determine a claim which has not, as between citizens of the State, become barred by the lapse of time. See State Const. art. VII, § 6. The act does not require the court to ignore this provision of the Constitution nor does it prevent the State from interposing the defense that any claim filed within the time the act provides is barred by the Statute of Limitations.

But the act is in perfect accord with the Constitution in permitting a claim to be filed when the same accrued more than six years prior to the filing, provided that within six years prior to the filing the State has acknowledged the claim in writing or by a partial payment of the same; for in such a case the claim would not "as between citizens of the state be barred by lapse of time."

In the case at bar we have the recognition of this indebtedness to the claimants by the State both in writing and by partial payment within six years prior to the filing of the claim. The question, therefore, here to determine is whether this claim of these claimants is one that as between citizens of the State could have been said to have been barred by lapse of time.

The State acknowledged the existence of this claim on the 1st day of December, 1909, by its written agreement. The claim was filed on the 18th day of October, 1915, which was within six years from the time of the contract above referred to; but, fur-

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ther than that, the State paid a portion of the damages which it owed the claimants on the 15th day of February, 1910. It is plain, therefore, that as between citizens of the State this indebtedness would not have become barred by lapse of time until six years from the date of this partial payment, and the claim was filed in about five years and six months after that time. The filing of the claim was, therefore, legally authorized by chapter 640 of the Laws of 1915.

This claim is one of the most meritorious that has been called to the attention of this court. Three of the judges of this court have viewed this property, and it certainly is a scene of waste and desolation. At the time of the appropriation this was evidently a fine farm. The Barge canal has been excavated right through the front of the farm, destroying all the buildings and cutting off all access to the farm. In addition to that, a short distance from the Barge canal prism a new channel was excavated through the farm for Wood creek, which was conducted across the farm in this new channel and then into the canal. The result of that has been that Wood creek in going through this new channel has washed away the layer of hard soil which from time immemorial constituted its bed, by reason of the fact that the point where it enters the Barge canal is some eight or ten feet below the natural bottom of the creek. As this hard soil was underlaid with a layer of quicksand the result has been that the banks of the creek have caved in for many feet on each side and several large gullies and erosions have been formed in the 235 acres of this farm unappropriated so that the same is nearly, if not completely, destroyed for any useful purpose. This 235 acres of land, therefore, is not only completely isolated, but it has also been practically destroyed by the construction through it of this new channel for Wood creek. The extent of this damage can hardly be realized except by those who actually see it. Every principle of justice and honor and fair dealing calls upon the State to make good the destruction of this farm for all available and useful purposes which it has brought about. The evidence in the case clearly establishes the fact that this farm prior to the appropria-

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tion was of the value of \$11,000; that after the appropriation it was worth not to exceed \$2,000. This leaves claimants' damages \$9,000, of which the State has paid \$3,800, leaving a balance due claimants of \$5,200, to which they are entitled, with interest from the date of the appropriation. An award should be made accordingly.

Webb and Fennell, JJ., concur.

VICTORIA KONNER v. STATE OF NEW YORK

No. 1279-A

(Dated October 17, 1916)

Claim for Damages Resulting from State Highway Construction in Front of Claimant's Premises.

The claimant for some years prior to May 1, 1913, owned a small tract of land on a public highway. Her premises were located on a precipitous hill rising abruptly from the highway at an angle of about 45 degrees. A stone retaining wall ran along the base of the hill in front of claimant's premises. In July, 1912, the construction of an improved State highway on the general site of the existing highway was begun. The highway contractor, following the plans and specifications of the State, by means of a steam shovel removed the retaining wall in front of claimant's premises and took away a portion of the hillside back of it. The result was that about the end of April, 1913, the greater portion of the hill slid down wrecking claimant's house and barn and ruining her property.

The Court found as a fact that the excavation by the contractor at the base of the hill went beyond the line of the highway and intruded within the close of the claimant, and held that this constituted a trespass on her premises, and that for the proximate consequence of this direct trespass the liability of the State was undoubted.

The Court further held that it was clearly negligent for the State to have removed the retaining wall at the base of the hill, particularly in view of the character of the soil and the precipitous nature of the land, and the location of claimant's buildings and the proximity to the State's operations.

The State contended that the six months' period within which the notice of intention to file the claim must be filed under section 264 of the Code of Civil Procedure, should be computed from the date of the tort, and not from the date of the injury resulting to the claimant therefrom. The Court held that this contention was unsound, that the claim of the claimant did not "accrue" until she had suffered the injury to her premises with its

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resultant loss, and that the notice of intention had been filed within six months from this time.

At the opening of the trial claimant moved to amend her claim by including the necessary allegations to constitute a trespass on the part of the State and its employees, and a like motion was made at the close of claimant's case to conform the claim to the proofs. These motions were granted with an exception to the State.

Harry M. Beck, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

CUNNINGHAM, J.— This claim originally was based upon the alleged negligence of the State. At the opening of the trial, claimant moved to amend her claim by including the necessary allegations to constitute trespass on the part of the State and its employees. A like motion was made at the close of claimant's case to conform the claim to the proof. On these motions, decision was reserved, with the provision by the court that upon the rendition of the decision on said motions, the party adversely affected thereby should have an exception to said ruling. The motions are hereby granted with an exception to the State. In my opinion there is no unfairness to the defendant in permitting the amendment. The notice of intention and the claim itself were ample notice to the State of the transaction, and a full opportunity was given to the State for such adjournment and facility as it might desire to meet the amendment.

For some years prior to May 1, 1913, the claimant was the owner of a small tract of land situate in the town of Liberty, Sullivan county, on the easterly side of the public highway leading from the village of Liberty to the village of Livingston Manor. Her premises were located on a precipitous hill, which rose abruptly from the highway at an angle of about forty-five degrees. Prior to the occurrences of 1912, hereinafter mentioned, her house on said premises was situate on said hill, about eighty-five feet from the highway, and at that time there was a dry stone retaining wall, about three feet high, along the base of said hill in front of claimant's premises, and separated from the traveled portion of

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the highway by the usual shallow highway ditch. The claimant's house was a two-story, fourteen-room frame building, of inexpensive construction, used for the reception and entertainment of summer boarders. There was a cellar eighteen by twenty-two feet under the house, and in the rear thereof a small frame barn. The house was erected at a cost of \$2,500 in 1906. The barn was older. The land, with barn, was sold in 1906 for \$250. Leading from the highway to the house were about twenty stone steps. The soil was a "sort of quick-sand with a hard-pan surface; sort of greasy." Along the westerly side of said highway ran a brook or creek, and during the last twenty-three years prior to July, 1912, the highway had gradually intruded easterly away from said brook, until the center line of it had moved easterly from its original location about twelve feet toward the site of claimant's house. In July, 1912, the construction of an improved highway — State highway No. 5223, route 41 — on the general site of the existing highway near the claimant's premises was begun, and it is conceded that the contractor followed accurately the plans and specifications of the State and its department of highways in the work, so far as it relates to this controversy. The interests of the State in said construction at said point, and the supervision of said work were in charge of employees of the State. In the month of August or September, 1912, the said contractor, acting under the directions of the State, by means of a steam shovel and otherwise, removed the aforesaid retaining wall, and excavated into the earth in the rear thereof a distance of between four and twelve feet, in order to widen the proposed road at that point. The original plans for said work did not include the erection of any new retaining wall along the claimant's premises. In the autumn of 1912 the claimant removed to New York city for the winter and did not return until about May 1, 1913. In October or November, the State, and its employees, discovered small cracks in the surface of the hill on which claimant's premises were situate. Thereafter, the State prepared plans for the erection of a concrete retaining wall at the base of the hill, but before the erection of the same, and at or about the end of April or the 1st of May, 1913, at a time when

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the soil was in process of thawing, the greater portion of the hill slid from its place over the site of the former retaining wall and of the excavation made by the State's contractor, and upon and over the highway and into the brook. As a result thereof, the claimant's property was ruined and rendered almost worthless, and her house and barn were wrecked and rendered utterly useless, except for such use as may be made of the material thereof. The premises are practically a total loss.

Some question was raised on the trial by the State as to the location of the boundary line of said highway and the premises of the claimant, but from the evidence I find as a fact that the excavation by the contractor at the base of the hill went beyond the line of the highway, and intruded within the close of the claimant, and constituted a trespass on her premises.

It was clearly negligent for the State to have removed the retaining wall at the base of the hill, particularly in view of the character of the soil and the precipitous nature of the land, and the location of the claimant's buildings and their proximity to the State's operations. There had been no landslides at this point during many years preceding. The appearance of the cracks in the surface of claimant's land within a few weeks after the State's operations, and the slide of the land itself, when the frost was in process of disappearing in the following spring, establish a satisfactory causal connection between the negligent operations by the State and its trespass on the land of the claimant, and the disastrous results to the claimant which followed. Of course, for the proximate consequence of a direct trespass the liability of the State is undoubted. The experts for the parties differed widely as to the extent of the claimant's loss. In my opinion, the premises were worth prior to the injury \$2,300, they were worth \$100 thereafter, and the damage to the claimant is \$2,200, for which an award should be made to her.

The State contended, as one of the grounds for its motion to dismiss the claim, that the notice of intention to file this claim was not filed within the time provided by law, in that it was filed more than six months from the time, in the month of August or September, 1912, when the acts were performed by the State and

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its contractor, which resulted in the injury the following spring. In other words, the State contended that the six months' period should be computed from the date of the tort, and not from the date of the injury resulting to the claimant therefrom. This contention is unsound. The statute provides that the claimant shall file her notice of intention "within six months after such claim shall have accrued." Code Civ. Pro. § 264. The statute does not read that the notice shall be filed within six months from the date of the commission of the wrong, or the performance of the act on the part of the State which resulted in the injury. The language of the statute is that the time shall be computed from the date when such claim "shall have accrued." The claim of the claimant did not "accrue" until she had suffered the injury to her premises, with its resultant loss.

From the foregoing it follows that the motion to dismiss the claim, made at the trial by the State, decision upon which motion was reserved by the court, with the provision by the court that upon the rendition of such decision the party adversely affected thereby should have an exception thereto, should be, and the same hereby is denied, with an exception to the State.

Ackerson and Paris, JJ., concur.

Ordered accordingly.*

ANN SLIVE, an Infant, by ETTA SLIVE, Guardian ad Litem, v.
STATE OF NEW YORK

No. 1903-A

(Dated October 17, 1916)

Claim for Personal Injury Resulting From the Negligent Operation of a
Canal Bridge.

During the progress of the State Fair at Syracuse in 1912, in preparation for a pageant arranged to take place alongside of the Erie canal at North

* Upon appeal by the State to the Appellate Division, Third Department, the judgment of the Court of Claims was reversed and the claim dismissed with costs. The opinion of Judge Woodward in the Appellate Division will be found in this volume at page 320, Kellogg, P. J., and Cochrane, J., dissenting.

Opinion by Cunningham, J.

Salina street in that city, a lift bridge over the canal was raised and temporarily made stationary. The claimant was a child, twelve years old, who participated in the exercises. At their conclusion it was necessary for her to cross the canal on the bridge in order to reach her home. At the conclusion of the pageant the bridge was being lowered when the claimant was forced forward by the crowd in such a manner that her foot was caught under the bridge and she sustained the injury complained of.

The Court held that, having ample notice of the conditions which in fact prevailed and having taken some measures to meet them, it was the duty of the State to make those measures such as would constitute reasonable precautions for the protection of the public and individuals against injury from the operation of the bridge; that the State had not reasonably fulfilled the duty which was thus cast upon it, and that the negligence of the State was the proximate cause of the claimant's injury.

The Court held that the State could not escape liability by the plea that the claimant's injury was caused by the action of the crowd for which it was not liable. That factor was one which the State was bound to anticipate, and although it was one of the causes of the claimant's injury, it was a combined, concurrent and co-operating cause with that of the State's negligence and not of such character as to deprive the State's negligence of its proximate causal relation to the injury.

The Court further held that the claimant herself was not negligent. She was where she had a right to be and where necessity compelled her to be. She had a right to assume that the State would fulfill its duty to protect her. She was powerless to resist the action of the crowd behind her and no blame can attach to her action at the time of the accident.

Claimant was awarded the sum of \$400.

Ray B. Smith, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

CUNNINGHAM, J. On September 11, 1912, the State fair was in progress in the city of Syracuse. In connection therewith, as had been customary since 1909, there was held on that evening and other evenings during the fair, a street carnival or pageant known as that of the "Mystic Krewe." A large number of children participated on that evening in said exercises, and among them the claimant, then a girl twelve years of age. These exercises took place at a point in said city adjacent to and along the northerly side of the Erie canal, at and near North Salina street, which is connected with South Salina street at that point by a

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hoist or lift bridge, then, and for a number of years prior thereto, owned, maintained and operated by the State of New York. Incident to the exercises a great crowd of many thousands of people gathered during said evening on North Salina street at said bridge. This had been so each year since 1909.

At the conclusion of said exercises it was necessary for the claimant to cross the canal from North Salina street to South Salina street in order to reach her home. At 6:30 o'clock P. M. of that day, the State, by its employees, raised said bridge to its full elevation above the canal and braced it in its upright position by placing heavy timbers under each corner of it, in preparation for the vast multitude which would cross it while raised. Pedestrians were able to cross it by means of stairways leading to the raised floor of the bridge, when in its upright position. The State, further, in preparation for the advent of the crowd, stationed some additional employees about the bridge, and at the time the bridge was raised, stretched across the entire street, sidewalks included, on each side of the bridge and a few feet from the edge of the canal, an ordinary rope. The bridge was maintained upright throughout the exercises and until 10:30 P. M. when it was lowered. At the north side of it a great crowd of persons, closely massed together, pressed toward the bridge while it was being lowered. In the front rank of this crowd was the claimant, on her way home. As the crowd pressed forward, she was carried with it in such manner that her foot was caught by and under the bridge as it was being lowered, and was bruised and injured. Two of the metatarsal bones adjacent to the small toe of her right foot were fractured. She was under a physician's care for about eight weeks, at the end of which time she had completely recovered from her injuries and the normal use of her foot was restored. There are no substantial permanent results therefrom.

The testimony is sharply contradictory, particularly as to whether there was, at the time the claimant approached said bridge, a rope across the sidewalk at the northwest side thereof. I am inclined to regard the testimony on both sides on this particular issue as credible. The employees of the State testify most positively that the rope was placed in position as above stated, and

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was removed that night after the claimant was injured. The claimant and several of her girl friends who accompanied her, together with a disinterested witness who was in the crowd near her at the time, testified, with equal emphasis, that they saw nothing of any rope and that their passage along said sidewalk was impeded by no barrier or guard of any kind. It is not contended by the State that State employees stationed at the bridge properly guarded, protected or maintained the rope in position, or that they restrained the crowd and kept the latter back and away from the rope. I think the correct inference from all the testimony is that the rope was there and was found there by the State employees some time after the claimant's injury, but that it was either trampled down or raised up by the crowd, as it pressed forward, so that it did not constitute an adequate barrier or protection to the claimant. If this is the correct conclusion to derive from the evidence, the only inquiry is whether the State was guilty of negligence which was the proximate cause of claimant's injury, and whether the claimant herself is free from contributory negligence. I arrive at an affirmative answer to both queries.

There can be no doubt that the State had ample notice of the general conditions which would prevail at the time and place of the accident. The carnival had been in progress on the previous evenings of the same week, and throughout the fair, during the several years prior to 1912, and the same conditions prevailed on all the previous occasions. The State should, therefore, have anticipated the great crowd which surged about the bridge. In fact, the State did so, and took certain measures, inadequate though they were, to care for the situation. It assigned extra employees to the bridge. It put great timbers under the floor of the bridge when raised, to provide for the anticipated strain to which the expected crowd would subject it, and it provided ropes across the street and sidewalks, as a barrier while the bridge was raised. Having, therefore, ample notice of the conditions which, in fact, prevailed, and having taken some measures to meet them, it was the duty of the State to make those measures such as would constitute reasonable precautions for protection of

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the public and individuals, against injury from the operation of the bridge. The fact that the State took some measures to that end is not enough. The measures taken should have been reasonably adequate, under all the circumstances, of which the State had notice, and which the State, in the exercise of due care, ought to have anticipated. As I have said, the State had notice of the conditions, and it was bound to have anticipated the action of the crowd in surging forward when the bridge was being lowered to the street level, and to have protected individuals accordingly.

I am convinced that the State did not reasonably fulfill the duty which was thus cast upon it. The placing of the rope alone at the north side of the bridge was insufficient under all the circumstances. In the exercise of due care, the State should have anticipated that the crowd in its onrush to the bridge would, in the absence of other precautions, do what it did. The State and its employees should have protected the rope from interference, and kept back the crowd therefrom, and restrained it within proper bounds, or should have placed such barriers as would, from their very nature, have fulfilled that function. Failing in this duty, the State was negligent, and that negligence was the proximate cause of the claimant's injury.

The State cannot escape liability by the plea that claimant's injuries were caused by the action of the crowd, for which it is not liable. That factor was one which the State was bound to anticipate and although it was one of the causes of the claimant's injury, it was a combined, concurrent and co-operating cause with that of the State's negligence and not of such character as to deprive the State's negligence of its proximate causal relation to the injury.

Nor was the claimant herself negligent. She was where she had a right to be, and where necessity compelled her to be. She had a right to assume that the State would fulfill its duty to protect her. She was powerless to resist the action of the crowd behind her, and no blame can attach to her action at the time of the accident.

It follows, therefore, that the State, being chargeable with notice of the conditions prevailing, and, in fact, having actual

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knowledge thereof, and having assumed to provide therefor, was bound to so provide in a reasonably adequate manner, and that the measures which it took, being inadequate, and the failure on its part to do so, being the proximate cause of the injury to the claimant, who was in the exercise of due care, the claimant is entitled to such an award as will properly compensate her for her injuries.

These injuries were not permanent. They were of comparatively short duration, and it is the opinion of the court, under all the circumstances, that the sum of \$400 will properly and justly compensate her therefor.

Motions were made by the State at the trial for the dismissal of the claim on various grounds. Decision on these was reserved by the court with the statement by the latter that upon decision thereof an exception would be granted to the party adversely affected thereby. These motions have been and are denied by the court with an exception to the State as to each motion.

Ackerson and Paris, JJ.; concur.

Ordered accordingly.

MABEL KLEINMEIER, an Infant, by CHARLES F. KLEINMEIER,
Her Guardian ad Litem, v. STATE OF NEW YORK

No. 766-A

(Dated October 17, 1916)

Claim for Personal Injuries.

In 1912 the claimant, then fourteen years of age, while passing the State armory at Schenectady, New York, was injured by ice and snow falling upon her from the armory roof, from which she sustained the injuries forming the subject of this claim.

The Court found from the evidence that the guard on the armory roof at the point from which the ice and snow fell was inadequate to prevent such fall; that frequently theretofore large masses of ice and snow had been precipitated from the roof at the same point and the safety of pedestrians on a public street thus menaced; and that the State officials in charge of the

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armory had ample notice of these things but had taken no measures whatsoever to prevent them.

The Court held that the evidence was such as would establish liability against an individual or a corporation in a court of law or equity and that, therefore, the State, having by section 264 of the Code of Civil Procedure consented that this Court might determine its liability, was liable for the injuries sustained. The liability for the condition which resulted in the injuries to the claimant could be predicated either upon the ground of negligence or of nuisance.

CLAIM against the State of New York for injuries caused by negligence.

Freyer & Lewis, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

CUNNINGHAM, J.—At about 3 o'clock P. M. of March 22, 1912, the claimant, then a girl of fourteen years of age, in excellent health and physique, was passing along the sidewalk of the public street adjacent to the New York State armory, in the city of Schenectady. A large mass of ice and heavy snow which had accumulated at a point near the intersection of the main roof and the roof of a dormer window of the armory, loosened by some hours of warm weather, slid from the roof and struck the claimant, throwing her to the ground and causing the injuries for which this claim is made. These injuries were very serious. The impact of the falling material against the right arm of the claimant bruised the tissue adjacent to the bone of the arm and hand, resulting in decay of the bone of the upper arm. As a result, the claimant, during the two years following her injury, was subjected to several serious surgical operations, both at her home and in hospital. Much of the osseous tissue, being decayed, was removed and splints used to prevent subsequent spontaneous fracture. These injuries and operations were very painful, and it is undisputed that the effects may be recurrent indefinitely in the future. The claimant's arm and hand are mutilated and disfigured very seriously and permanently. For many weeks she was incapacitated from labor and physical activity, and her

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physical capacity for labor will be permanently restricted. The evidence established that the guard on the armory roof at the point from which the ice and snow fell, was inadequate to prevent such fall, there being no guard whatsoever on the roof of the dormer window at the point in question, and the guard on the main roof at that point being insufficient for the purpose. Frequently, theretofore, large masses of ice and snow had been precipitated from the roof at the same point, and the safety of pedestrians on the public street thus menaced; of all of which the State officials in charge of the armory had ample notice, and to prevent which they had taken no measures whatsoever.

The foregoing facts were undisputed on the trial. The only questions involved are, whether these facts render the State liable for the claimant's injuries, and the amount of such compensation.

The jurisdiction of this court in a claim predicated upon the negligence of the State, its servants or employees, resulting in injury to the claimant is now comprehensive. The development of that jurisdiction and of the present broad and just attitude of the State toward individuals has been progressive. It is fundamental legal principle that the sovereign cannot be sued without his consent. That consent has been somewhat grudgingly given. Its first manifestation was the creation of the original predecessor of this tribunal. To it the State gave jurisdiction, by its statute, in an exceedingly limited class of cases. Thence, progressively, our commonwealth arrived at its present just policy, whereby jurisdiction is conferred upon the Court of Claims by section 264 of the Code of Civil Procedure, as follows: "The court of claims possesses all of the powers and jurisdiction of the former board of claims. It also has jurisdiction to hear and determine a private claim against the state, * * * which shall have accrued within two years before the filing of such claim and the state hereby consents, in all such claims, to have its liability determined. * * * In no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. * * *

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By this enactment, the State has consented that this court may determine its liability upon any private claim against it, upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity, subject to certain exceptions and limitations set forth in the statute, which have no bearing upon this claim. *Fifth Ave. Coach Co. v. State*, 73 Misc. Rep. 498; *Herkimer Lumber Co. v. State*, 73 id. 501; *Burke v. State*, 64 id. 558; *Litchfield v. Bond*, 105 App. Div. 229; *Nussbaum v. State*, 119 id. 755; *Carroll v. State*, 73 Misc. Rep. 516.

The inquiry which this case presents, therefore, is whether the evidence is such as would establish liability against an individual or corporation in a court of law or equity. There can be no doubt that such a liability would be thus established. Both reason and authority dictate the result. The liability for the condition which resulted in the injuries to the claimant may be predicated either upon the ground of negligence or of nuisance. The armory was built by the State and was the property of the State. The State was responsible for any negligent defect in its original construction. The armory was under the control and in the care of the State and its employees. *Military Law*, §§ 186, 187; *Matter of Bryant*, 152 N. Y. 412. The evidence abundantly establishes knowledge on the part of the said State employees of the defective and dangerous condition, for a long period prior to the accident and up to and including the day thereof, and a total neglect on their part to properly guard against injury to pedestrians therefrom. Thus, the negligent omission of the State is established.

The fact that with knowledge of existing conditions the State and its employees took no steps to abate the menacing and dangerous condition which they knew to exist, but permitted the same to continue to the menace of pedestrians for an unreasonable time, renders the State liable also on the theory of nuisance. *Hogle v. Franklin Mfg. Co.*, 199 N. Y. 388; *Walsh v. Mead*, 8 Hun, 387; *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 337; *Tremblay v. Harmony Mills*, Id. 598.

The State is thus liable in this claim because upon the legal evidence herein adduced, an individual or corporation under the

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same circumstances would be held liable in a court of law to the claimant for the injuries which unquestionably she has received.

The motions which were made on the trial by the State to dismiss this claim, decision upon which was reserved by the court, are hereby denied with exceptions to the State.

It is our opinion, therefore, that an award should be made upon this claim which will justly and adequately compensate the claimant for the injuries which she has suffered.

Ackerson and Paris, JJ., concur.

Award accordingly.

CHARLES F. KLEINMEIER v. STATE OF NEW YORK

No. 765-A

(Dated October 17, 1916)

Claim for Amount Expended by Claimant on Medical and Surgical Care of
Daughter Injured by Negligence of State.

Claimant's daughter recovered from the State damages for personal injuries. The claimant, her father, expended \$313.05 for the medical and surgical care made necessary as a result of her injuries. The liability of the State for the injuries having been established in the daughter's action against the State (see page 101), it necessarily followed that the father was entitled to be reimbursed by the State for this expenditure.

Fryer & Lewis, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

CUNNINGHAM, J.—The claimant is the father of one Mabel Kleinmeier, who was by her guardian *ad litem* the claimant in claim No. 766-A, against the State. The principal facts are sufficiently set forth in the opinion of the court in the last mentioned claim. The evidence adduced upon the trial of said claim, by stipulation of the parties, was made part of the evidence herein,

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in so far as applicable hereto. The said Mabel Kleinmeier resided with her father, the claimant herein, at the time of her injuries and was supported by him. He paid for the medical and surgical care of his said daughter as a result of her said injuries, the sum of \$313.05, which, it is undisputed, was a reasonable and proper expenditure therefor. Our conclusion in the claim of Mabel Kleinmeier against the State, above referred to, is necessarily conclusive here.

The motion to dismiss this claim, which was made on the trial, decision upon which was reserved, is hereby denied, with an exception to the State, and an award should be made to the claimant in the sum of \$313.05.

Ackerson and Paris, JJ., concur.

LOUISE SANNUCCI, an Infant, by PAOLO SANNUCCI, Her Guardian at Litem, v. STATE OF NEW YORK

No. 1003-A

(Dated October 17, 1916)

Claim for Personal Injuries.

A surveying force from the office of the State Engineer and Surveyor, while surveying certain parcels of land in Medina, N. Y., as a preliminary to the appropriation of some of said land for the Barge canal, drove a wooden stake into the ground in the beaten portion of a dirt path leading to the side door of the house in which claimant resided with her parents, the stake being intended to mark one of the corners of the premises occupied by the claimant and, in fact, so doing. The stake protruded several inches above the surface. The claimant had no knowledge of its having been placed there, or of its existence. While returning to her home at night, her foot struck the stake causing her to fall to the ground with much violence.

Reviewing the evidence, the Court held that the stake was carelessly and improperly driven, that assuming the State owed a duty to the claimant that it should be properly and carefully driven, the State was negligent, that this negligence was the proximate cause of the claimant's injury, and that the claimant was free from contributory negligence.

On the question of whether the State owed a duty to the claimant which required that the stake should be driven with reasonable care, the Court held that the State did owe such a duty, basing its decision on the general

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proposition that a man must do the things which he has the right to do, or which are inherently lawful in themselves, if properly done, with reasonable care and due regard for the welfare and safety of the property and person of his neighbor; and that this standard of conduct which applies among individuals also applies, under the facts in this case, between the State and its citizens (section 264 of the Code of Civil Procedure).

The Court held that the decisions governing the duty of the owner of real property to persons coming upon it had no application, that the State did not own the premises, and that the question of ownership of the *locus in quo* is of no importance here, further than to leave no doubt that the claimant was where she had a right to be, and was doing what she had a right to do. Assuming that the State was within its rights in making a survey and driving the stake at that point, the claimant has as much right there as the State, its employees, or its stake.

CLAIM against the State of New York for injuries received by negligence.

Ryan & Skinner, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

CUNNINGHAM, J.— On April 21, 1912, and for about two years theretofore, the claimant, who was at that date, fifteen years old, lived with her family in premises on the westerly side of Glenwood avenue, in the village of Medina, in this State. Along the street in front of said premises was a stone sidewalk, from which sidewalk a stone walk led to the front door of the dwelling-house thereon. A beaten dirt path led diagonally across the front yard of the premises from the side door of the dwelling-house to the said street sidewalk, said path being a “short cut” from the side door to the street sidewalk. Some time between the month of January, 1912, and the above date, a surveying force from the office of the State Engineer and Surveyor was engaged in surveying various lot or property lines and boundaries, in the vicinity of said premises, as a preliminary to the appropriation of a portion of some of said premises for the purposes of the Barge canal. In making said survey, one of the State employees drove a stout wooden stake into the ground in the beaten portion

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of said dirt path, the same being intended to mark one of the corners of the premises occupied by the claimant, and, in fact, so doing. The stake was solidly driven into the ground, and protruded several inches above the surface. The claimant had no knowledge of its having been placed there, or of its existence. While returning to her home, in the dark, on the evening of April 21, 1912, she was walking from the street sidewalk to the side door of her house over the aforesaid path or "short cut." In doing so, her foot struck the stake, causing her to fall to the ground with much violence, and resulting in a serious sprain of her left wrist. She was under the care of a physician for two or three months and was unable to use her hand during that period. There are some very slight results of her injury which may be permanent. There was some testimony to the effect that the radius bone of her arm was broken, but it was unconvincing, and, in fact, it was conceded by the claimant's physician that if it did exist, it was of such a character as to add nothing whatever to the seriousness of her injury in any respect. The claimant paid for medical attention because of her injury, out of her own individual funds and separate estate, the sum of fifty dollars. There was testimony on the part of the State that the stake was driven almost "flush" with the ground, but, for some reason, the employee who actually drove the stake was not placed upon the witness stand and I am convinced that the proper and usual manner of driving such a stake for the purpose it was intended to serve is to drive it "flush" with the surface of the ground. I am equally convinced that this method was not followed in this case. The express and specific testimony of a number of witnesses establishes this fact, and is corroborated by the fact that, except for the stake, the path at the point where claimant fell was smooth and level.

The evidence raises three questions: *First*, if the stake was driven with reasonable and due care; *second*, if the State owed any duty to the claimant which required that due and reasonable care should be exercised in placing the stake; and *third*, whether the claimant was free from contributory negligence. In view of the evidence above outlined, the court is of the opinion that the

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stake was carelessly and improperly driven, and, assuming that the State, in driving it, owed a duty to the claimant that it should be properly and carefully driven, that the manner in which it was placed constituted actionable negligence, and that this negligence was the proximate cause of the claimant's injury. The court is certain, too, that the evidence establishes the claimant's freedom from contributory negligence. The sole inquiry remaining is the second above referred to, to wit, did the State owe a duty to the claimant in the premises, which required that the stake should be driven with reasonable care? The State contends that the stake was not driven on the premises of the claimant, but was driven at the corner thereof; that the State, and its servants, had a legal right to drive it there, and that the claimant was not proceeding over her own premises at the time she was injured, and because of the place of the accident, the State owed her no duty which it violated. We are referred to the decision of the Court of Appeals in the case of *Donahue v. State*, 112 N. Y. 142.

The general rule, which our courts have recognized, as defining the duty of our people, in their relations to each other, is embodied in the maxim *sic utere tuo ut alienum non lædas*. In other words, it may be said as a general proposition, that a man must do the things which he has the right to do, or which are inherently lawful in themselves, if properly done, with reasonable care and due regard for the welfare and safety of the property and person of his neighbor. This is the standard of conduct which applies among individuals within our commonwealth, and it is the standard which the law compels us to apply, as between the State and its citizens. Code Civ. Pro. § 264. This is true, unless the place of the accident was such as to preclude or limit the application of this general rule. It is true that the owner of real property is held to varying degrees of liability for his use of, and his activities upon his own premises, as against an individual, who may be a tenant, an invitee, a trespasser, a licensee, or one thereon by the sufferance of the owner. And it is quite evident that it is some phase of either of these limitations to the general rule that the learned Deputy Attorney-General had in mind in calling the court's attention to the *Donahue* case.

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There can be no question, however, that that case and these limitations to the general rule, governing the activities of individuals, has no application here. The State did not own the premises occupied by the claimant, nor did the State own the adjoining premises, or the premises whose boundaries it was surveying, or whose corner it was marking. It was engaged in investigation, for map making preliminary to the acquisition of such property as it might need, but surely the State was not in the position of owning the property upon which the accident occurred, and upon which the claimant happened to be at the time. The question of ownership of the *locus in quo* is of no importance here, further than to leave no doubt that the claimant was where she had a right to be, and was doing what she had a right to do. Assuming that the State was within its right in making the survey and driving the stake at that point, surely the claimant had as much right there as the State, its employees, or its stake. The Donahue case cannot affect our determination. There, the claimant was injured while on the State's property, where she had no right to be, except by the sufferance of the State, and the Court of Appeals held that the State owed no duty to her of active or affirmative vigilance to keep said premises safe for her, or others, there for their own convenience. Furthermore, it was found specifically by the trial court that the claimant in that case was guilty of contributory negligence.

It follows, therefore, that there was nothing in the location of the accident which modifies the duty of the State toward the claimant and others, to drive the stake in a reasonably careful and prudent manner, under all the circumstances incident thereto. The claimant should receive an award by this court for such an amount as will properly compensate her for the damage she has sustained.

Ackerson and Paris, JJ., concur.

Award accordingly.

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JOHN T. MURRAY v. STATE OF NEW YORK

No. 778-A

(Dated October 17, 1916)

Claim for Damages to Motor Truck Resulting From Breaking of Canal Bridge.

An employee of the claimant, a building contractor, drove claimant's motor truck across the Nineteenth Street lift bridge over the Erie canal in Watervliet, N. Y. The truck was proceeding in a proper manner and at a speed of less than six miles per hour. The front end of the truck had entirely crossed the bridge, and the rear thereof was still thereon, when some of the wooden timbers, supporting the plank flooring of the bridge, suddenly broke off sharply, and fell into the canal below, and the plank flooring broke underneath the truck, precipitating the latter violently down upon the steel girders of the bridge, several feet below the floor thereof. As a result, the truck and its load were extricated at considerable difficulty and expense, and the truck was materially injured, necessitating various repairs and causing a loss of some days in its use and operation, the total damage amounting to \$398.25. This claim is for reimbursement for said alleged loss to the claimant.

The Court, reviewing the legislation relating to said bridge, held that the bridge was a state bridge, that the State was not only liable for any negligence of its employees in the construction of the bridge but also in its operation and maintenance; and that under the doctrine *res ipsa loquitur* the State was liable.

The Court further held that the legislation limiting liability to loads not exceeding eight tons in weight was specifically confined to town bridges, and that the State had thus indicated its intention to exclude from any such limitation its own, or the bridges of any municipal corporation other than a town, that there was a reason for this policy, as obviously a different standard should govern the capacity of rural bridges, subjected only to the loads incident to agricultural and other rural pursuits, than that which should control bridges in great cities and large communities, with their varied building, manufacturing and commercial enterprises, and the loads which are incident to their operation.

The Court held that under the facts of this case the load was not unusual, nor the claimant negligent.

John F. Murray and William H. Murray, for claimant.

Egburt E. Woodbury, Attorney-General (Archie C. Ryder, Deputy Attorney-General), for State.

CUNNINGHAM, J.—The claimant is a building contractor. On November 8, 1912, and for some time prior thereto, he was the

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owner of a "Pierce-Arrow" motor truck, of five tons carrying capacity. On that date, said truck, driven by an employee of the claimant, and carrying a concrete mixer and appurtenances, was proceeding across the bridge over the Erie canal, in the city of Watervliet, in this State, known as the "Nineteenth Street lift bridge," en route from the Troy Hospital in the city of Troy, to a point in the city of Albany. The truck weighed 4,000 pounds. Three men were on it, weighing approximately 450 pounds, in all. The evidence does not clearly fix the weight of the remainder of the load on the truck, but as we gather therefrom, it was 5,800 pounds. The truck was proceeding in a proper manner and at a speed of less than six miles per hour. The front end of the truck had entirely crossed the bridge, and the rear thereof was still thereon, when some of the wooden "sleepers" or timbers, supporting the plank flooring of the bridge, suddenly broke off sharply, and fell into the canal below, and the plank flooring broke underneath the truck, precipitating the latter violently down upon the steel girders of the bridge, several feet below the floor thereof. As a result, the truck and its load were extricated at considerable difficulty and expense, and the truck was materially injured, necessitating various repairs and causing a loss of some days in its use and operation, amounting to a total of \$398.25. This claim is for reimbursement for said alleged loss to the claimant.

The State's evidence indicated upon the trial several grounds of opposition to the claim:

1. That it was not shown that the bridge is a State bridge.
2. That no negligence on the part of any State officer in the construction, care or maintenance of the bridge was established.
3. That the weight of the combined load to which the claimant subjected the bridge was in excess of eight tons, and that this fact exculpates the State from liability.
4. That the evidence would establish no legal liability against an individual in a court of law, and, therefore, not against the State in this tribunal.

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I am convinced that there is no merit to any of these contentions and that the claimant should recover.

The bridge was constructed by the State Superintendent of Public Works on plans and specifications of the State Engineer and Surveyor, and at the expense of the State. The statute providing for its construction enacted that, when completed, it should be operated under the Superintendent of Public Works, but at the expense of the town of Watervliet. Laws of 1891, chap. 239. Subsequently, by chapter 905 of the Laws of 1896, the city of Watervliet was incorporated, including within its boundaries the site of the bridge in question. Thereafter, by chapter 714 of the Laws of 1900, it was provided that the said bridge should continue to be operated under the direction of the Superintendent of Public Works but at the expense of the city of Watervliet. Furthermore, Alfred M. O'Neill, assistant to the Deputy Superintendent of Public Works, testified that prior to the accident, the State had maintained the bridge and made such repairs as it deemed necessary. Therefore, the bridge was a "State bridge" and the State was not only liable for any negligence of its employees in the construction of the bridge, but also in its operation and maintenance.

We are of the opinion that the negligence of the State is unquestionable. The doctrine of *res ipsa loquitur* applies to this case.

The principal contention of the State is that the combined load imposed by the claimant on the bridge exceeded eight tons in weight. In the first place, it affirmatively appears that it was less than eight tons. But, in any event, we are unable to understand why that arbitrary weight should apply. It is true that a *town* is free from liability for the breaking of any bridge under a load weighing eight tons or over. Highway Law, § 331. But this statutory provision has no application here. The Legislature specifically limited it to *town bridges*. By doing so, it can be said fairly that it intended to exclude from any such limitation its own, or the bridges of any municipal corporation other than a town. There is a reason for this policy. Obviously, a different

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standard should govern the capacity of rural bridges, subjected only to the loads incident to agricultural and other rural pursuits, than which should control bridges in great cities and large communities, with their varied building, manufacturing and commercial enterprises, and the loads which are incident to their operation. So far from the statutory provision above referred to indicating a policy on the part of the State to fix an arbitrary maximum weight of eight tons for all bridges, the proper method of statutory construction requires the very opposite conclusion. Nor can the court say that the weight of the load was unusual or improper, or the defendant negligent. Quite the contrary.

The evidence is such as would establish in a court of law, legal liability in favor of the claimant against an individual or corporation defendant. Were a toll bridge corporation, or a city or county, to be the defendant, under the facts disclosed here, its liability would be definite and certain.

The jurisdiction of this court over private claims against the State is now broad. Code Civ. Pro. § 264. The fundamental test is whether the evidence is such as would establish the liability of a person or corporation in favor of the claimant in a court of law or equity.

We are, therefore, led to the result I have indicated. The claimant should recover the amount of the damage which he has established.

It follows that all of the several motions made by the State at the trial, and at the end thereof, for the dismissal of this claim, decision upon which was reserved with the provision by the court that an exception would be granted to the party adversely affected thereby when made, should be and the same hereby are severally denied with an exception to the State as to the denial of each.

Ackerson and Paris, JJ., concur.

Ordered accordingly.

Davies v. State of New York

MARIAN DAVIES v. STATE OF NEW YORK

No. 2290-A

(Dated October 18, 1916)

Claim for Damages Resulting From the Permanent Appropriation of Land
for Barge Canal Purposes.

Claimant was the owner of lands north of the city of Utica and lying along the Mohawk river. The Mohawk river had always overflowed these lands carrying fertilizing silt on to them and making them valuable as farm lands, but at the same time preventing their use for manufacturing and industrial purposes. Some years ago and before the Barge canal was constructed a portion of the river channel was straightened by the city of Utica and diked. As some of the lands were not thereafter subject to annual overflows, and the river was confined in its new channel, this new condition permitted an extension of the city to the north for manufacturing concerns and enterprises of a similar nature. In response to this opportunity for enlargement certain small parcels had been sold to the New York Central and Hudson River Railroad Company and to the Standard Oil Company at prices from \$4,000 to \$5,000 an acre. There had been very few sales of any kind of these lands, and while the sales which had been made had been at a large price per acre, the acreage purchased was very small compared to the total number of acres in the district similarly situated. Claimant's witnesses in general valued the property on the basis of its use for industrial purposes, and the State's witnesses on the basis of its use for farm purposes. The wide divergence of opinion in the two sets of witnesses made this testimony of practically no value to the court unless the theory of one set of witnesses could have been accepted as the theory upon which the market value ought to be based. The award, therefore, had to be based almost wholly upon the viewing of the premises required by section 268 of the Code of Civil Procedure.

The Court held that all of the facts and circumstances regarding these lands had to be taken into consideration when trying to arrive at a fair market value; that it was the influence of all the facts and circumstances that influenced those who would care to buy or sell, and that it was hardly permissible to take actual sales of small parcels and apply them as fixed yard sticks to measure large areas. The fact that practically the whole of the large acreage similarly situated always had been used for farm purposes and was so used at the time of the appropriation should be given great weight when considering the estimates of the experts. Furthermore, the value of the land appropriated varied somewhat in proportion to its distance from the industrial district, the nearest land having a value based upon its probable development and utility for industrial purposes, and the land at the far edge of the flats having a farm value with portions influenced by the trend of residence development. Governed by these principles, the Court held that the difference in the fair market value of claimant's farm before and after the appropriation amounted to \$18,792.15.

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A portion of the land appropriated was in the old bed of the Mohawk river. The Court's award for this portion of the land was based on the understanding that this land had been a part of the Cosby Manor grant, and that under the decision of the Court of Appeals in the case of *Williams v. City of Utica*, 217 N. Y. 162, construing this grant, the claimant at the time of the appropriation owned it on fee.

CLAIM against the State of New York for lands belonging to claimant appropriated by the State near the city of Utica.

Miller & Fincke, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook and Michael H. Quirk, Deputy Attorneys-General), for State.

FENNELL, J.—Witnesses for claimant testified that the reasonable market value of the seventy-five acre farm belonging to claimant, from which the appropriation was made, was \$5,000 an acre. Witnesses for the State placed the market value of the same farm at \$400 an acre — a difference of over 1200 per cent. Witnesses for the claimant placed the value of the old river bed at \$4,000 an acre and witnesses for the State at \$100 per acre — a difference of 4000 per cent. All the witnesses for the claimant are in substantial agreement with each other as are the witnesses for the State. Under such circumstances there is no sworn testimony upon which the court can base an award except by using the figures given by claimant's witnesses or the figures given by the State's witnesses. The award must be based almost wholly upon the view of the premises by the judge or judges hearing the claim, which viewing is required by statute. The property in question has been viewed by the judge hearing the claim and by two other judges.

The wide divergence of opinion in the two sets of witnesses makes those opinions of practically no value to the court unless the theory of one set be accepted as the theory upon which the market value ought to be based. It is to be regretted that witnesses, apparently so well qualified, could not get closer together on the market value of the property in question and not leave that dependent almost entirely upon the "viewing of the premises by the judges."

Opinion by Fennell, J.

The lands north of the city of Utica and north of the Mohawk river are very flat. The United States topographical map of that district shows the twenty-foot contour level from a mile to a mile and a half from the edge of the river,— indicating a strip several miles long and a mile to mile and a half in width where the level does not vary more than twenty feet. The Mohawk river has always overflowed these lands carrying fertilizing silt on to them and made them valuable as farm lands. The value of these lands to a farm is definitely shown by the shape of the farms in that locality, all of the original farms running from the hills on the north down across the gravelly lands and on across the sandy loam deposited on the river level to the bank of the river. Each farm had a portion of Mohawk flat land. The Mohawk river bends gradually toward the north and away from the city for about a mile and then makes a sharp bend toward the city for a greater distance than a mile, runs along close to the New York Central tracks for about a mile, then makes a bend toward the north, curving back immediately, like a horseshoe, to the south and then to the northeasterly to about the middle of the flat lands. The back bend in the river bringing it close to the city of Utica and the annual floodings of the river kept the city from extending to the northward. For a great many years the lands of the claimant and others had a market value simply as farm lands. Some years ago, and before the Barge canal was constructed, the river channel was straightened by the city of Utica from the northerly end of the big bend as above mentioned to the northerly end of the shorter horseshoe shaped bend next easterly. This straightening of the river and the diking of the same gave the lands adjacent thereto a value in addition to their farm value. Some of the lands not being thereafter subject to annual overflows, and the river being confined in its new channel, allowed an extension of the city to the northerly for manufacturing concerns and enterprises of a similar nature. In response to this opportunity for enlargement certain small parcels were sold to the New York Central and Hudson River Railroad Company and to the Standard Oil Company at prices from \$4,000 to \$5,000 an acre,— the Standard Oil Company buying about five

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and one-half acres and the New York Central Railroad a few acres. There have been very few sales of any kind of these lands and while the sales which have been made have been at a large price per acre, the acreage purchased was very small compared to the total number of acres in the district similarly situated. The lands in this district have a considerably higher value for industrial expansion purposes than for farming purposes and it may well be that a few acres or portions of acres will sell at the rate of \$4,000 or \$5,000 per acre, but it seems to the court that it can hardly be said that the several hundred acres similarly situated had a reasonable market value in 1913-1914 of \$5,000 per acre. The farm in question was seventy-five acres in extent and in addition there were two and seven thousand two hundred and forty three ten thousandths acres in the bed of the Mohawk, before the river straightening, and afterwards in the bed of the stub end of the Mohawk still under water but not in the then channel of the stream. This stub end of the Mohawk was taken for a Barge canal harbor for the city of Utica. The court cannot agree with the contention of the claimant that this farm was worth considerably over one-third of a million dollars. It is true that certain acres or fractions of acres lying closest to the manufacturing district might, when the demand arose, sell at the rate of \$4,000 or \$5,000 an acre,—particularly if some large corporation wished a particular site for a particular purpose,—as was the case in the purchase made by the New York Central and Hudson River Railroad Company and the Standard Oil Company,—but it can hardly be said that the prices paid for these particular parcels are the true measure of the reasonable market value of the entire acreage similarly situated. Conceding that certain small parcels might sell at the rate of \$4,000 or \$5,000 per acre it might be fifty years before all the land similarly situated would be absorbed in industrial development.

All of the facts and circumstances regarding these lands must be taken into consideration when trying to arrive at the “fair market value.” It is the influence of all the facts and circumstances that influence those who would care to buy or to sell. It is hardly permissible to take actual sales of small parcels and

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apply them as fixed yard sticks to measure large areas. If claimant's value witnesses are sound in their estimates, it would seem that the owners of several hundred acres similarly situated have been content to accept incomes from farm lands at farm value returns when they might exchange for many millions of dollars ready for immediate investment. Practically the whole of this large acreage similarly situated always had been used for farm purposes and was so used at the time of the appropriation,—excepting of course the portions appropriated for Barge canal work. This fact should be given great weight when considering the estimates of these experts. It would seem, therefore, that the value of the land appropriated varied somewhat in proportion to its distance from the industrial district, which district was near the rail transportation system. The nearest land having a value based upon its probable development and utility for industrial purposes,—the land at the far edge of the flats having a farm value with portions influenced by trend of residence development. Four acres nearest the industrial district would have a fair market value of \$2,000 an acre; the next four acres of \$1,500 an acre; the next three and four hundred and thirty thousandths acres \$1,000 an acre, and the two and seven thousand two hundred and forty-three ten thousandths acres under water \$500 an acre. The land under water is fairly well situated but to be utilized would require a large outlay for filling and grading. The difference in the fair market value of claimant's farm before and after the appropriations amounts to \$18,792.15.

It is understood that the property described in this claim as being in the old bed of the Mohawk is a portion of the Cosby Manor grant, so called, which grant was passed upon in the case of *Williams v. City of Utica*, 217 N. Y. 162, and the award in this claim as to the land in the old bed of the Mohawk is made upon that basis.

Findings have been drawn accordingly.

Ackerson and Webb, JJ., concur.

Battle Island Power Company v. State of New York

BATTLE ISLAND POWER COMPANY v. STATE OF NEW YORK

No. 1491-A

(Dated October 18, 1916)

**Claim for Damages Resulting From the Permanent Appropriation of Land
for the Barge Canal.**

The land appropriated was a long narrow strip in the city of Oswego on the line of the Oswego canal along the edge of the Oswego river. The claimant contended that its value should be based on "lot values" and that these lots would be specially desirable as they fronted on a State highway, had Oswego river at the back, were forty feet above the river and commanded a beautiful view across and beyond the river.

The Court held that while it would have been feasible at the time of the appropriation to divide this property into lots and put it on the market so divided, it could not be regarded as having had an immediate sale value at that time for all the lots so plotted; that the reasonable market value of the property was not based upon desirability alone but upon desirability plus probability, direction, speed and opportunity for city growth; that there was a great deal of desirable land similarly situated in and about Oswego, and that taking all these elements into consideration \$3,000 was a fair measure of the reasonable market value of the land as a whole at the time of the appropriation even if it were to be cut up into lots.

An allowance of \$250 was made for a barn on the premises on the basis that the land was to be cut into lots and the barn sold and moved off or used in building a structure on one of the lots.

AMENDED claim against the State of New York for damages growing out of the appropriation of certain lands in the city of Oswego along the Oswego canal.

Gannon, Spencer & Michell (Charles A. Collin of counsel),
for claimant.

Egburt E. Woodbury, Attorney-General (Edward J. Mone,
Deputy Attorney-General), for State.

FENNELL, J.— The only question raised by the amended claim herein is the value of four and one hundred and twenty-five one-thousandths acres of land in Oswego lying between the center line of Syracuse avenue (sometimes called River road) and the

Opinion by Fennell, J.

easterly blue line of the Oswego canal along the edge of the Oswego river. The property is long and narrow having a frontage of 1,862.3 feet on Syracuse avenue. A portion of the property slopes somewhat steeply to the river bank.

It is the contention of the claimant that the value of the property should be based on its "lot values," as shown on a plot, and that on such a basis the property would be worth about \$7,500. While it would have been feasible to divide this property into lots and put it on the market so divided, at the time of the appropriation in April, 1912, it nevertheless cannot be regarded as having had an immediate sale value at that time for all the lots so plotted. The growth of the city of Oswego, during a number of years prior to the appropriation, was not such as to give any reasonable assurance of marketing all of these lots except after the lapse of many years.

It was urged by claimant that these lots would be especially desirable as they fronted on a State highway, had Oswego river at the back, were forty feet above the river and commanded a beautiful view across and beyond the river. All of these desirable features were present, but the reasonable market value of this property is not based upon the desirability alone but upon desirability plus probability, direction, speed and opportunity for city growth. There was a great deal of desirable land similarly situated in and about Oswego. The probable demand for lots would hardly warrant the estimate made by the claimant's witnesses as the then reasonable market value. Three thousand dollars would be a fair measure of the reasonable market value of the land as a whole at the time of the appropriation even if it were to be cut up into lots. All the lots, when sold, might total a larger sum, but the number of years that would probably elapse between the first and last sales of lots would, taken in connection with the tax charge and loss of interest, bring the market value of the property at the date of the appropriation to the figure named. An allowance for \$250 is made for the barn on the premises on the basis that the land was to be cut into lots and the barn sold and moved off or used in building a structure on one of the lots.

Webb, J., concurs.

Christian v. State of New York

JOSEPH CHRISTIAN v. STATE OF NEW YORK

No. 141-A

(Dated October 18, 1916)

Claim for Damages for Personal Injuries.

The claimant was employed by the State as a cleaner at the State Capitol. He was told to clean certain high windows in the Tax Commission's office, and for that purpose picked out from among several ladders a light fourteen-foot step-ladder. Claimant was on the ladder, on the next step to the top, when the step gave way, then several steps broke one after the other as he struck them until he fell through the ladder to the floor.

Reviewing the evidence the Court held that this ladder was not of proper construction, that the constant use of the ladder, so constructed, weakened it and made it unsafe, that it was unsafe at the time of the accident and that the State had failed in its duty to provide him with a safe place in which to work.

There was a conflict of evidence as to whether the cleaning boss had warned the claimant not to use that particular ladder. The Court held that if the cleaning boss felt it his duty to warn claimant about the weakness of the step-ladder, it was his duty to tell claimant to stop using it, that it was the duty of the State to see that it was proper for the purposes for which it was being used and also its duty to inspect this ladder and keep it in repair and safe condition; that the State failed in this duty to the claimant and for this failure was liable to him for the damages directly resulting from the accident.

The Court held, however, that the evidence was insufficient to charge the State for a certain chronic physical condition of the claimant which, so far as the evidence disclosed, might have been due to some prior and continuing cause rather than to the fall itself.

CLAIM against the State of New York for damages by an employee of the State at the Capitol in Albany.

Frederick H. Chew, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.— On the 24th day of June, 1910, claimant was in the employ of the State, at the Capitol in Albany, as a cleaner.

Opinion by Fennell, J.

On that day the claimant was told to clean certain high windows in the Tax Commission's office. Claimant picked out from among a number of ladders a light fourteen-foot step-ladder. Claimant was on the ladder, on the next step to the top, when the step gave way, then several steps broke one after the other as he struck them until he fell through the ladder to the floor. He received severe bruises to the back, chest, right hip, and a bump on the back of the head. He was confined to his bed for two weeks and was away from work about a month. He returned to work in the latter part of July, 1910, and worked until February 28, 1911, at which time he was laid off with others when a change in the State administration occurred. He has been working since in a newspaper office sweeping floors and dusting.

The ladder in question was fourteen feet long; the stringers were one inch by one and one-half inch spruce; two stringers on each side; steps, spruce, seven and one-half inches wide and three-quarters of an inch thick; a three-inch by six-inch piece was nailed between the two stringers at each step and the end of each step was sunk into this piece to the depth of one-eighth of an inch. There were no iron tie braces running from one side to the other of the ladder to hold the ends of these steps into the one-eighth inch dadoes. This ladder, with the steps so placed, and nailed into the end with two small six-penny nails was not of the proper construction to use while washing high windows. The constant use of the ladder, so constructed, weakened it and made it unsafe. It was unsafe at the time of the accident to the claimant. The State did not provide him with a safe place in which to work.

There is a direct conflict of testimony between claimant and the cleaning boss, Gibbons, as to what was said by each to the other just prior to the accident and at the time claimant was standing on one of the top steps of the ladder cleaning the window in question. Gibbons testified he went up to the claimant saying: "Joe, it is dangerous to use so high a step-ladder to wash windows." He stated that Joe replied: "I like the step-ladder better because it doesn't hurt my feet like rungs."

If Gibbons felt it his duty to warn claimant about the weak-

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ness of the step-ladder it was his duty to tell claimant to stop using it. This ladder was made to be used at any distance up to fourteen feet. It was the duty of the State to see that it was proper for the purposes for which it was being used. It was only natural for a man whose duty required him to stand on a step-ladder or a rung ladder for considerable stretches of time to prefer a wide, flat step to a narrow, round rung. The ladder had been used for the same purpose right along and the State was charged with the duty of keeping it safe. Deeper dadoes and a few iron cross-rod braces would have made the ladder safe. These precautions should have been taken by the State. *Cummings v. Kenny*, 97 App. Div. 114; *Stewart v. Ferguson*, 164 N. Y. 553; *Burks v. State*, 13 Court of Claims Reports, 153, 64 Misc. Rep. 558.

It was the duty of the State to make inspection of its ladders and keep them in repair and in safe condition. *Corbett v. N. Y. C. & H. R. R. Co.*, 151 App. Div. 159. In *Shovan v. Lozier Motor Co.*, 158 App. Div. 487, we find that an employee had a right to assume that the spurs on the ladder had been sharpened and that the ladder was safe. That is going even farther than this case for the dullness of the spurs was observable while the defective condition of the step-ladder might not be observable except on the inspection of one accustomed to making inspections or otherwise qualified to do so.

While the accident was caused by the State's negligence and there is no evidence of any negligence on the part of the claimant, still there seems to be some doubt as to whether or not the claimant's condition in 1915 was due to his fall in 1910. No bones were broken. He was in bed only two weeks. He was at work again in four weeks and stayed until the following February, when he was laid off when there was a change in the State administration. He has been working ever since. There is a direct and positive conflict of medical testimony. Claimant's physicians testified that his condition in 1910 and at the time of the trial in 1916 was the same, was premature senility, was a permanent condition and was due to the accident. They acknowledged on cross-examination that the condition might be due to

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arterio-sclerosis. The State's experts swore that arterio-sclerosis was never due to traumatism. Claimant's physicians testified that his condition in 1916 was the same as in 1910 and that they examined him right after the accident in 1910 and then found his symptoms of body tremors, and so forth, which his physicians state might be due to arterio-sclerosis. Upon their theory, this condition must have occurred right after his fall from the ladder. If he was in such a condition immediately after the fall it is certainly as reasonable to hold that his condition was then due to some prior and continuing cause rather than to the fall itself. Under such circumstances a finding in claimant's favor on this point cannot be made. The State, however, should pay claimant the damages which he showed were the direct results of this accident. Those damages have been placed at \$450 and findings have been made accordingly.

Paris, J., concurs.

Ordered accordingly.

MARY E. BROWNLOW v. STATE OF NEW YORK

No. 2515-A

(Dated October 18, 1916)

Claim for Damages Resulting From Personal Injuries.

On March 23, 1915, between 7:30 and 8:00 P. M., the claimant was walking westerly in front of the State armory in Elmira. A stairway parallel with the front of the building led down to the basement from the east to the west. The south side and west end of the opening were protected by an iron rail, the north side was closed by the building itself, the east or upstairs end was open. In order to avoid a large crowd collected in front of the armory, the claimant tried to make her way to the right and around the edge of the crowd. She walked directly into the unprotected opening at the east side of the stairway and fell to the bottom of the stairs, severely injuring herself.

The Court held that the position of the stairway, taken in connection with the surroundings, made the use of the sidewalk dangerous; that the State not only should have foreseen, but had foreseen, the danger because it had guarded the opening so as to protect a person coming from the west, but that it had failed in its duty to protect a person coming from the east; and that, under all the circumstances, the claimant was free from contributory negligence.

An award of \$1,652 was made in favor of the claimant.

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CLAIM against the State of New York for injuries caused by negligence.

Knapp & Marlowe, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

FENNELL, J.—The claimant was injured on State property in front of the State armory in the city of Elmira, N. Y., on the 23d day of March, 1915, between 7:30 and 8 o'clock P. M. The claimant at the time of the accident was fifty-seven years of age and was engaged, on her own separate account, with her son, in the insurance business, and lived with her husband and son in the city of Elmira, N. Y.

On March 23, 1915, between 7:30 and 8 o'clock P. M. she was walking westerly in front of the State armory on the north side of East Church street in said city. A large crowd had collected in front of the city hall and the armory, following the arrest of the murderer of the chief of police and the detective sergeant of the city. The city hall is the next building east of the armory. The murderer was then in a cell in the city hall. The crowd grew so large and menacing the local militia company was called out to help preserve order. A police patrol driveway separates the city hall from the armory. The sidewalk in front of the city hall extends from curb to building and is very wide. The sidewalk in front of the armory, next west, does not extend to the building except in front of the main central front doors which lead on to the street. In the space in front of the armory, between the police patrol driveway and the main entrance, and some five feet northerly from the north edge of the sidewalk, is a stairway leading down into the basement of the armory. This stairway is about three and one-half feet wide, six feet deep and ten feet long, the long way of the opening being east and west and parallel with the front of the building. The building forms the north wall of the opening. Nine steps lead downward from the

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east toward the west. The south side and west end of the opening were protected by an iron rail, the north side was closed by the building itself, the east end or upstairs end was open. Claimant while proceeding westerly along the north side of Church street, and endeavoring to get past the crowd, kept to her right close to the south wall of the city hall. She crossed the driveway and proceeded directly westerly and close to the south wall of the armory, still trying to make her way around the edge of the crowd. She walked directly into the unprotected opening at the east end of the stairway and fell to the bottom of the stairs. Her injuries were severe and she was confined to her bed for five or six weeks and to her house for five months. There was a separation of the cartilage from the second rib and sternum on the right side, her right ankle was twisted, strained and weakened. She suffered from shock immediately after the accident and suffered pain for many months thereafter. An "X-ray" photograph taken two weeks after the accident, showed no broken bones in chest or ankle. At the time of the trial, eleven months after the accident, claimant's ankle was still weak and she was still lame.

This case presents three questions. *First*, did the stairway make the use of the highway dangerous? *Second*, should the State have foreseen that such an accident might reasonably have been expected to happen and therefore be guarded against? *Third*, was claimant negligent?

It was held by this court in *Carroll v. State*, 73 Misc. Rep. 516, former Presiding Judge Rodenbeck writing the opinion, that if the excavation be "substantially adjoining the way" the liability attaches.

The sidewalk in front of the city hall extended from curb to building. The open space in front of the armory extended from curb to building. It is true the sidewalk did not cover this whole space. However, the size and layout of the city hall walk, of the armory walk, and the city hall and armory facades making the same line, the walks and the adjacent open spaces being on the same level, all taken together gave the appearance, under the conditions of night time and the large crowd, of an open public highway and sidewalk. It would seem that the opening was not

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only "substantially adjoining the way" but, under the circumstances, was in what was, apparently, a part of the way.

Second. The State not only should but actually did foresee that an accident might happen because of the nearness of the stairway to the stone sidewalk. The State protected the stairway on the west end and south side by an iron railing. On the north side the building itself formed the protection. Foreseeing the dangerous condition that might arise if a crowd large or small collected in front of the armory and moved about watching the soldiers, or some other crowd-gathering attraction, an iron railing had been placed on two of the remaining three open sides of the stairway. If it was considered necessary to have a railing on the west and south it was just as necessary on the east — the only difference being that while the drop into the opening from the west or south would be a sheer one of six feet the drop from the east would be just as far but not so sheer — being down nine steps. The danger of falling in was the same from the east as from the west but the results of a fall from the west would probably be more serious — being a sheer drop. The place was recognized as dangerous and steps taken to reduce the danger but the final step of installing a small movable gate, iron bar or chain at the east end was not taken.

Third. The claimant was not negligent. She passed along the sidewalk close to the wall of the City Hall on the inside of the walk going substantially straight ahead and passing through the outskirts of the crowd. She was warranted in assuming because of the apparent continuity of the facades, same ground level, the absence of barriers, the presence of so many people all about, filling the street and the sidewalk from curb to building, that the fair passageway she had just come over was a continuous one on ahead of her — all the surrounding conditions being so nearly identical.

With so large a crowd present the street lamps, at the distance away they were, would throw shadows of the crowd across the opening of the stairway and tend to obscure it rather than to light it. The light from the windows of the armory being directly over but some distance above the opening would also tend to throw a shadow across the top of the opening.

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Under all the circumstances it would seem that the claimant was exercising reasonable care as she passed along, but that the State left part of its duty undone when it protected two sides of the three sides of the dangerous stairway and left the third side entirely unprotected and unguarded — particularly when protection would have been obtained by placing a light movable rail, gate or chain three and one-half feet long across the open end. The claimant should recover her damages from the State and findings have been made accordingly.

Paris, J., concurs.

Ordered accordingly.

GEORGE C. KILTS and LUCRETIA KILTS, his Wife, v. STATE OF
NEW YORK

No. 413-A

(Dated October 18, 1916)

Claim for Damages Resulting From Barge Canal Construction.

Claimants' farm extended along Wood creek in Oneida county for about one and one-third miles. This creek overflowed this land each year, depositing a fertilizing silt on the farm. The State, in the construction of the Barge canal, cut off this creek from the farm, stopping this annual fertilization and also depriving the farm of a substantial running stream which was valuable for the use of the stock thereon.

The State set up the defense that Wood creek carried the sewage of the city of Rome and that therefore it had no value as a watering place for stock. The Court held, however, that in view of the circumstances that it was generally and well known in that locality that the city of Rome had been and was continuing to take steps looking toward the establishment of a sewage disposal plant, there had not been, as a matter of fact, a very great depreciation in the values of land along the creek; that when the sewerage into the creek is stopped and the creek gets back to its normal condition it will be a valuable asset to this farm for stock watering purposes; and that the present use of the creek for sewerage purposes, while it has some bearing on the present value of the adjacent lands, does not materially mitigate the damage to this farm caused by the permanent taking of the entire flow of the stream.

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Wood creek formed a natural cattle barrier across one entire end of the farm. The Court held that the fact that the water being taken from the creek will require the owner to fence his farm, should be and was taken into consideration as an element of damage in the award made in this claim.

CLAIM against the State of New York for damages resulting from appropriation by the State of Wood creek and turning it away from claimants' farm.

Davies, Johnson & Wilkinson, for claimants.

Egburt E. Woodbury, Attorney-General (Harry W. Ehle, Deputy Attorney-General), for State.

FENNELL, J.— In this claim the claimants were in possession of and owned a farm of eighty acres in the town of Vienna, county of Oneida. Wood creek bordered on the farm for 425 rods or about one and one-third miles. There are several "Wood creeks" which have been interfered with more or less in canal construction. This particular Wood creek was the old water way between the Hudson water shed and Lake Ontario water shed, being a passageway for canoes and boats from the Mohawk river into Oneida lake and through Oneida lake, Oneida outlet and Oswego river into Lake Ontario. It was and is a substantial running stream. The State, in the construction of the Barge canal, cut off this creek from the premises in question by turning the creek into the Barge canal for a feeder. Wood creek overflowed claimants' farm each year depositing a fertilizing silt on the farm. The cutting off of the creek stopped this annual fertilization and also deprived the farm of a substantial running stream which was valuable to the farm for the use of the stock thereon.

The State set up in defense that Wood creek carried the sewage of the city of Rome and that therefore it had no value as a watering place for stock. This latter contention is not well founded. It is true that Wood creek is now being used, as it has been for a great many years, for carrying the sewage of the city of Rome but the evidence shows that an injunction order was granted restraining the city of Rome from sewerage into Wood creek. The operation of such order has been stayed and extensions of time granted

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on the filing of releases given by the farmers who owned land along the creek, pending the time when the city of Rome will erect a sewage disposal plant. It is generally and well known in that locality that the city of Rome is and has been taking steps looking toward the establishment of a sewage disposal plant. Wood creek, carrying the sewage of the city of Rome would be of no value to this farm for stock watering purposes and the cutting off of the creek would not damage the farm in that respect if Wood creek were to continue indefinitely as an open sewer.

While the market value of the farm is and has been affected by the sewerage into Wood creek still the general knowledge that it would soon be free from sewage and be running in its natural manner prevented a very great depreciation in the values of lands along the creek, particularly as the city of Rome is paying the owners of lands along the creek for the privilege of sewerage into the creek past their lands. When the sewerage into the creek is stopped and the creek gets back to its normal condition it would be a valuable asset to this farm for stock watering purposes. The State has permanently taken away the creek not only in its present condition as a sewage carrier but in its following condition which will be its natural condition. The present use of the creek for sewerage purposes, while it has some bearing on the present value of the adjacent lands, does not materially mitigate the damage to this farm caused by the permanent taking of the entire flow of the stream.

The stream formed a natural cattle barrier across that entire end of the farm. The water being taken from the stream will require the owner to fence his farm. All these elements of damage are taken into account in the award filed herewith.

Paris and Webb, JJ., concur.

Park v. State of New York

EMMA B. PARK v. STATE OF NEW YORK

No. 643-A

(Dated October 18, 1916)

Claim for Damages Resulting From the Erection by the State of a Dyke
Along the Chemung River.

The State, under certain legislative acts, erected a dyke on the south side of the Chemung river in the city of Corning along a portion of claimant's farm. During the periods of heavy spring and fall floods the water had previously overflowed the south bank, but the dyke since its erection had confined the water to the river channel thus causing it to run more swiftly. This condition piled up a gravel island or bar below the end of the dyke and caused a gradual change of current in the river. The bank on the north side of the river being high, the water crowded towards the south bank and slowly cut away the low slope, later the normal bank and finally the tillable land beyond. The portion of the farm beyond the end of the dyke, about thirty-five acres in extent, was subjected to considerable current when the water was high, which current washed away the top soil. Because of this condition this part of the farm several years ago was turned into a meadow and finally into a pasture.

The cutting of the high bank commenced in 1901 but the notice of intention to file the claim was not filed until March 15, 1912. The Court held that the State had, by the faulty design and construction of the dyke, interfered with the natural channel and flow of the river, that the State may or may not have owed a duty to build a dyke, but, having built it, the State must assume any damages arising from the failure to build it properly, but that inasmuch as the notice of intention was not filed until March 15, 1912, the claimant could recover only those damages which had occurred from September 15, 1911.

It was held that the measure of damage to claimant because of the cutting off of her land by the river was the depreciation in the fair market value of her farm between September 15, 1911, and the date of the trial; that in addition the claimant was entitled to the annual rental value of the said thirty-five acre piece less the rental value for the purposes for which it could now reasonably be used in the course of good husbandry, being subject to such a current.

The balance of claimant's farm was flooded by back water, but the Court found that this back water condition was present before the dyke was constructed and no award was made for any damage for such back water flooding.

CLAIM against the State of New York for damages resulting from erection of a dyke by the State in the Chemung river and

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changing the current with the result of creating a gravel bar to the injury of claimant's land.

Stanchfield, Lovell, Falck & Sayles, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

FENNELL, J.—Under authority of chapter 705 of the Laws of 1892 a dyke was erected along the south side of the Chemung river in the city of Corning and to the west boundary of the farm next west of the claimant's property. Under authority of chapter 221 of the Laws of 1895 the State extended this dyke downstream and partly across the river end of claimant's farm, which farm consisted of ninety-six acres. The statute directed that the dyke should extend across the lands of Robert F. Park "to the high bank there existing." Some distance downstream from the end of the dyke, as built, there is a high bank at the mouth of a small tributary stream.

The Chemung river, draining a mountainous section of southwestern New York and northwestern Pennsylvania, has periods of very high water every year. In such periods of high water the river is swift, roily and carries quantities of silt; it also, at such times, moves quantities of gravel from place to place.

The south bank of the river at claimant's farm and the upstream farms was high enough to restrain the high waters except in the heavy fall and spring floods. In these floods the water came over the normal bank and spread out over the large, low flat lands back of the normal bank and to the higher lands beyond. The dyke, being erected on the top of the normal bank, restrained these floods to the river channel, thus raising the water in the channel and causing it to run more swiftly. This had a tendency to, and did, pile up and create a gravel island or bar at a point below the end of the dyke where the flood water extended out over the low lands and lost some of its speed and carrying capacity.

A low wide slope extended along the south bank of the river

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along claimant's property and between the normal bank and the low water edge of the stream. This slope was from 75 to 100 feet wide and was covered with willows, thickets and some large trees. The top of the normal bank was covered with large old trees.

The gradual accretion of the island below the end of the dyke caused a gradual change of current in the river. The bank on the north side of the river being high the water crowded towards the south bank and slowly cut away the low slope, later the normal bank and finally tillable land beyond. The cutting away amounted to twelve and six-tenths acres up to October, 1915. The cutting of the high bank commenced in 1901 and reached nine and seven-tenths acres by January, 1912, an average for ten years of about one acre per year. From January, 1912, to October, 1915, two and nine-tenths acres were cut off, a little less than an acre per year. The notice of intention having been filed March 15, 1912, the damages since September 15, 1911, can be considered. The total cutting in that period from October, 1911, to February, 1916; was five acres. The depreciation in the fair market value of the claimant's farm caused by the cutting away of the land between October, 1911, and the time of the trial amounted to \$1,500.

The downstream portion of the farm, beyond the end of the dyke, about thirty-five acres in extent, was subjected to considerable current when the water was very high, due to the rapid spreading of the flood water below the end of the dyke. This current tends to wash away the top soil if the flood happens to occur when the fields are plowed. Because of this condition this part of the farm was turned into a meadow and finally into a pasture some years ago.

There are two questions in this case.

Did the State interfere with the natural channel and flow of the river and by faulty design or construction of the dyke cause damage to the claimant? What is the amount of such damage?

The erection of the dyke, in the very erection of it, proves it was an interference with the flow of the river and an altering of its natural channel. That was the purpose of its construction.

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The restriction of the river to the new channel, created by the high bank on the north side of the river and the dyke in question on the south side, raised the elevation of water in the new channel and compelled a faster flow in proportion to the narrowing and deepening of the channel as compared with the cross section flowage area under the conditions prior to the change. Straightening, narrowing or deepening channels of running streams causes them to scour out on the bottom,—while the widening of the same streams will permit the scoured material to accumulate on the bottom in proportion to the widening and slowing of the current. This was the condition brought about by the erection of the dyke and the ending of it in the middle of a field instead of against a bank. Ending the dyke in this manner was an improper and faulty design, as placed, considering the purposes for which the dyke was built and the probable results of so ending it. The statute, under authority of which it was constructed, sets forth what would have been a proper design as far as ending is concerned. Across the lands of Robert F. Park “to the high bank there existing.”

Did this condition damage claimant? Naturally the accumulation of dirt and gravel on the bottom grew into an island and turned the stream toward the bank. The bank has been cutting away at the rate of about an acre a year. Prior to the building of the dyke the normal bank was about seven feet high, and below that, and between it and the low water, or summer stage, was a strip 75 to 100 feet wide running the length of the river frontage of the farm. The lower strip was covered with willows and some large trees while the top of the normal bank was covered with large old trees. The presence of these large old trees showed a natural, substantial and undisturbed normal bank of at least several generations. Surely some obstruction is interfering with the natural flow when the cutting has taken away the lower slope, the bank with its large trees and the field beyond at the rate of an acre a year. The restriction of the flood waters between the north bank and this dyke on the south bank, causing a swifter and deeper stream, coupled with the open space at the end and beyond the end of the dyke, caused a condition somewhat similar

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to a hydraulic dredge in operation,—moving material by water under pressure and restriction, and then depositing the material by eliminating the restriction.

Claimant's contention that thirty-five acres of the downstream portion of her farm is subject to swift currents when the river is at high flood due to the ending of the dyke in the middle of the flat fields seems logical and is supported by proof. This current running over a plowed field, would be so damaging to the land, by removing the top or fertile portion of the soil, that the claimant has given up tilling the land there and is using it for pasture. This is good judgment on her part and also tends to reduce the damages which might reasonably be expected to result if the land was plowed and tilled.

The measure of damage to claimant because of the cutting off of her land by the river is the depreciation in the fair market value of her farm between September 15, 1911, and the date of the trial. In addition the claimant is entitled to the annual rental value of the said thirty-five acre piece less the rental value for the purposes for which it can now reasonably be used, in the course of good husbandry, being subject to such a current. The balance of claimant's farm, forty acres in extent, was flooded by backwater. This backwater condition was present before the dyke was constructed and no award is made for any damage for such backwater flooding.

The State may or may not have owed a duty to build the dyke, but, having built it, the State must assume any damages arising from a failure to build it properly.

Findings have been made accordingly.

Paris, J. concurs.

Opinion by Fennell, J.

ANDREW L. FRANCE v. STATE OF NEW YORK

No. 320-A

(Dated October 18, 1916)

Claim for Personal Injuries.

The claimant, while driving a horse and covered wagon, started to cross the lift bridge over the Erie canal on Salina street, Syracuse. The bridge started to rise after he was upon it. He hurried to get across the bridge but when he reached the further edge the bridge was up about two feet. The horse jumped off the bridge, pulling the wagon after him. The wagon tipped over. The claimant and his horse were injured and the wagon was rendered valueless.

The Court held from the evidence that the claimant was not properly warned that the bridge was to be raised and that he was allowed to get on the bridge through the negligence of the state's employees, which employees were charged with the duty of protecting the public when the bridge was being raised; that having gotten on the bridge and finding that the bridge was about to go up, the claimant was warranted in trying to get off the bridge as soon as possible and in not taking the chances of remaining high up in the air with his horse and wagon until the bridge was lowered; that under the circumstances he was not charged with the same duty of care as he would have been if he had had plenty of time to think and to decide upon the best course.

The claim was allowed as to the direct injuries to the claimant and his horse and the loss of his wagon. The Court held, however, that the evidence failed to show that the claimant suffered from a chronic condition alleged to have resulted from the effects of a blow on the head; and refused any award on this score.

CLAIM against the State of New York for damages caused by negligence.

Miller & Matterson, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.—On November 6, 1911, at about 10:30 A. M., claimant was driving south on North Salina street in Syracuse and approached the bridge where that street crosses the Erie canal. He was driving a covered wagon containing teas and

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coffees. Claimant drove on to the bridge and was on his way across the same when it started to rise. He hurried to get across the bridge but when he reached the southerly edge the bridge was up about two feet. The horse jumped off the bridge, pulling the wagon after him. The wagon was tipped over throwing claimant through the top of the wagon.

The horse was laid up for four weeks during which time claimant had to hire another horse, for which he paid one dollar and fifty cents a day, which was a reasonable figure. The market value of the horse before the accident was one hundred and twenty-five dollars, and its market value after the accident was seventy-five dollars. The market value of the wagon was twenty-five dollars and after the accident it had no value.

Claimant's forehead was gashed about two and one-half inches; his left nostril was torn; there was a hole through his upper lip; a small cut over his right eye; back strained; and he received a severe bump on top of his head.

It seems reasonably clear, from the evidence, that the claimant was not properly warned that the bridge was to be raised, and that he was allowed to get on the bridge through the negligence of the State's employees, which employees were charged with the duty of protecting the public when the bridge was being raised. Having gotten on the bridge and finding that the bridge was about to go up, the claimant was warranted in trying to get off the bridge as soon as possible and not take the chance of remaining high up in the air with his horse and wagon until the bridge was lowered. When he had gotten almost to the edge of the bridge, and it was found to be up two feet, his horse became unmanageable and jumped from the bridge. Under such circumstances he was not charged with the same duty as though he had plenty of time to think and decide upon the best course.

There is no question that the claimant received some very severe cuts and bruises, particularly the bump on the head as he was thrown through the top of his wagon as it pitched forward and fell off the bridge. It is contended that the blow on the head produced chronic pachymeningitis and that the claimant has been suffering from that for a long time due to this injury. Exam-

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inations of claimant and his symptoms, made by experts on the day of the trial, were the basis of entirely divergent opinions. Experts for the claimant concluded that he had chronic pachymeningitis and that it was caused by the accident. Experts for the State testified that he showed no objective signs or symptoms of pachymeningitis and that his main subjective symptom was pain in the head. It was also found that his blood pressure was 230 and that he had some enlargement of the heart and some hardening of the arteries. The State's experts testified that the examination showed no faulty reflexes of patellas or of the eyes, and that the shape of his head was normal and no bump was observable.

It would seem that if the claimant had been suffering from chronic pachymeningitis since the time of the injury, a period of four years, that well-qualified experts should be able to determine that fact. From the evidence of the experts we feel that we would not be warranted in making a finding that claimant was suffering from chronic pachymeningitis at the time of the trial.

Nor can we agree that his extraordinarily high blood pressure of 230 was due to the accident.

Paris, J., concurs.

Ordered accordingly.

MOHAWK VALLEY CANNING COMPANY v. STATE OF NEW YORK
No. 10437

(Dated October 25, 1916)

**Claim for Damages Resulting from Permanent Appropriation of Land for
the Delta Reservoir.**

Claimant owned a cannery with land south and north of the cannery buildings. The area appropriated was the land to the south of the cannery buildings. This land had been used for unloading and for storage purposes

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during the canning season, the cannery being arranged and equipped to handle raw material from the south toward the north into the buildings. The State had also appropriated and flooded about four and one-third square miles of land in the vicinity of the buildings, not owned by the claimant but from which the claimant had obtained about four-fifths of its raw material.

The claimant asked damages for substantially the entire value of the entire plant claiming that the taking of the storage room on the south side of the cannery and leaving only the land on the north left claimant without sufficient storage room and also left it on the wrong side of the plant with respect to the equipment, that the bringing of the water so near the cannery had a bad effect on the business causing the cans to become rusty, etc., and also that the State in flooding the area from which four-fifths of the raw material used in its cannery was produced actually shut off four-fifths of the supply and thereby made the cannery useless and ruined the business.

The two judges signing the award went upon the lands in question and into all the buildings and carefully examined the whole situation and, based upon the evidence in the case and upon this inspection held that the land actually taken on the south by the State was of the reasonable market value of \$200 an acre; that the cost of rearranging the machinery to handle the raw material from the north side of the cannery instead of the south side would have been \$1,500; and that the cost of tile-draining and leveling off the land to the north of the buildings to make the same suitable for the purpose for which the lands south of the buildings had been used before the appropriation would have been \$500.

The Court refused to allow the item for the rusting of the cans on the ground that it had no sound basis on fact.

The Court also held that the State was not in duty bound to pay claimant because of the damage that it had sustained by being deprived of the raw material coming from the four and one-third square miles of land appropriated from others and flooded; that had the same area of land been bought by a private individual and turned into a pasture or even into a park the claimant would have been injured in exactly the same manner but would have had no right of action against the owners in fee for using their property for grazing purposes or for a park instead of producing raw material for claimant's cannery, and that as these facts would not establish liability against an individual or a corporation the Court could not base an award upon them in favor of the claimant.

No allowance was made in the award for any loss on buildings or machinery. The appropriation was made in November, 1909, but from that time to the time when the premises were viewed by the Court in the summer of 1915, the claimant had allowed the machinery to remain in the buildings, and to become rusty and to go to pieces, so that it became practically useless. The Court held that it was the claimant's duty to dispose of the machinery in the buildings at the best figure possible and to dismantle or make such other use of the buildings as economy of material and building would warrant; that claimant had not taken the reasonable and proper steps to reduce the damages which flowed from the stopping of its cannery operations and the aban-

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doning of its property; that it was not necessary to estimate what if any salvage should have been made at or immediately after the time of the appropriation as it was the opinion of the Court that the State was not legally liable to the claimant for the stopping of its business and the abandoning of its canning plant.

CLAIM against the State of New York for damages to claimant's canning factory by appropriation of lands to form part of Delta lake.

Mason & Harrington (Timothy Curtin of counsel), for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

Per Curiam — Claimant company owned a cannery with lands south and north of the cannery buildings. The State of New York appropriated about four and one-third square miles of land which lands were flooded by the building of the Delta dam. This dam impounds waters known as Delta lake for the purpose of supplying the Barge canal. The lands flooded by Delta lake were rich fertile low lands, were immediately adjacent to claimant's cannery and from which low lands, as testified by one of claimant's witnesses, the claimant obtained four-fifths of its raw material. The appropriation line runs on the easterly, southerly and most of the westerly side of the lot on which the cannery buildings stand. At one place the appropriation line is within seven feet of some of the buildings and with a five-foot head over the crest of the dam the flow line will be twenty-five feet inside the appropriation line or at the stage of highest water would be thirty-two feet from some of the buildings. At the time of the trial the water had not been within one hundred and fifty feet of the buildings.

It was testified upon the trial on behalf of the claimant that the entire property was worth \$12,613.85 and that the salvage value of some of the machinery was \$607 making a net damage of \$12,006.85. Claimant owned one and nine-tenths acres of land. The area appropriated was one and one hundred and twenty-six

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thousandths of an acre. The area remaining to claimant was seven hundred and seventy-four thousandths of an acre.

Claimant's witnesses testified that the remaining land and buildings had no value after the appropriation and the only salvage was \$607 on certain machinery and that the one and nine-tenths acres of land had a reasonable market value of \$1,000.

Claimant used the lot south of its cannery, which lot was one and one hundred and twenty-six thousandths acres in extent, for unloading and storage purposes during the canning season. The cannery was arranged and equipped to handle raw material from the south toward the north into the buildings.

Claimant asks damages for substantially the entire value of the plant claiming that the taking of the one and one hundred and twenty-six thousandths acres of storage room on the south of the cannery and leaving only the seven hundred and seventy-four thousandths acres on the north of the plant left claimant without sufficient storage room and also left it on the wrong side of the plant with respect to the equipment for carrying, also claiming that the water being brought so near the cannery had a bad effect on the business, causing the cans to become rusty, etc.; also that the State in flooding the area from which four-fifths of the raw material used in its cannery was produced actually shut off four-fifths of the supply and thereby made the cannery useless and ruined the business. The two judges signing this award have gone upon the lands in question and into all the buildings and carefully examined the whole situation thereabouts and based upon the evidence of the case and that inspection we are of the opinion that the one and one hundred and twenty-six thousandths acres taken were of the reasonable market value of \$200 an acre; that the cost of rearranging the machinery to handle the raw material from the north side of the cannery instead of the south side would have been \$1,500; that the cost of tile-draining and leveling off the land to the north of the buildings to make the same suitable for the purpose for which the land south of the buildings had been used before the appropriation would have been \$500.

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We are not convinced that the claimant's contention that the blowing of the winds across the lake would rust the cans sufficiently to injure the business of the claimant has a sound basis in fact. The testimony shows that the Olney & Floyd Canning Company's plant was and is in operation about a mile from the claimant's plant on the bank of the same Delta lake and only three hundred feet from the flow line. We cannot agree with claimant's contention that the State in taking so large an area of land from which claimant's raw material came took anything away from the claimant for which the State is in duty bound to pay claimant. Had the same area of land been bought by a private individual and turned into a great grazing pasture or even into a park the claimant would have been injured in exactly the same manner but would have had no right of action against the owners in fee using their property for grazing purposes or a park instead of producing raw material for claimant's cannery. Of course it is a hardship on claimant that its cannery happened to be located on the side of this fertile basin but as these facts would hardly establish liability against an individual or a corporation we do not see how we have authority to make any award against the State for this damage which claimant has undoubtedly suffered. For the reasons above stated we have not included as an element of damage in the award given in this claim either the bringing of the waters of the lake near the buildings of the cannery nor the taking of the four and one-third square miles of territory in the immediate neighborhood from which territory the claimant drew four-fifths of its raw material.

No allowance is made in the award to claimant for any loss on buildings or machinery. The appropriation was made November 10, 1909,—the claim was filed February 27, 1911, was heard in April, 1915, and viewed by the court in the summer of 1915 and during all this time the machinery stayed in the buildings, becoming rusty and going to pieces.

It has now become practically useless. If the claimant could not continue in business either because of the act of the State or any other reason it was its bounden duty to dispose of the

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machinery in the buildings at the best figure possible and to dismantle or make such other use of the buildings as economy of material and building would warrant. Claimant cannot let the cannery stand idle and the buildings and machinery depreciate until the whole are practically useless and then with justice ask the State to pay practically the full value of the machinery and buildings even if the State's acts were responsible for the closing of the cannery and the State was legally liable to pay the damages flowing therefrom. Claimant herein has not taken the reasonable and proper steps to reduce the damages which flowed from the stopping of its cannery operations and the abandoning of its property. It is not necessary to estimate herein what if any salvage should have been made at or immediately after the time of the appropriation as it is the opinion of the court, as stated above, that the State is not legally liable to the claimant for the stopping of its business and the abandoning of its canning plant.

CLARA EMERSON v. STATE OF NEW YORK

No. 2221-A

(Dated October 27, 1916)

Claim for Damages for Personal Injuries Resulting from the Falling of a
Canal Bridge.

On August 11, 1913, claimant was driving a Ford automobile along State highway No. 27, which is the main traveled route between the Adirondack section and the main east and west highway across the State passing through Utica. It was necessary for her to turn sharply to the northeast to pass over Main street bridge crossing the Black River canal at Boonville, N. Y. Striking the planks near the right side which ran lengthwise on top of the floor, she turned the car sharply to the left and ran against a suspension rod on the left side. With the assistance of several people, the car was pulled back, straightened around, the engine cranked, and she got back into the machine. She started the car forward across the bridge when the bridge structure settled at one corner. Claimant to avoid tipping over, turned the car "head on" in the direction of the settling. When the bridge struck the edge of the canal bank and stopped, part was on the bank and part in the canal. The car was right side up, tipped sharply forward and directly against the right side of the bridge at its lowest part as it lay collapsed. The

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other three corners of the bridge remained substantially in place. Claimant was thrown forward against the wheel and back against the seat and received injuries for which she brought the present claim.

The evidence showed that the State had actual notice of the inadequacy of the bridge. The Superintendent of Public Works in 1912 had approved in writing a bill providing for the building of a new bridge and this bill became a law fifteen months before the accident. The Court held that the State was clearly negligent in permitting the use of the bridge under such circumstances, that although the claimant's course when she first came upon the bridge was erratic, nevertheless at the time of the actual falling of the bridge her car was in a proper place and nothing was done by her at that time to cause the bridge to give way and settle down. The manner of the settling of the bridge and the fact that it did not commence to settle where claimant hit the suspension rod disproves the State's contention that the collision of claimant's auto with the suspension rod was a contributing cause of the accident.

CLAIM against the State of New York for damages caused by negligence.

Clarence R. Sperry, T. Harvey Ferris and C. R. Dewey, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.— On August 11, 1913, at about 2 P. M. claimant was injured by the falling of Main street bridge over the Black River canal at Boonville, N. Y. Claimant was driving a Ford automobile weighing about 1,550 pounds. She occupied the right front seat; a Mr. Loren the left front seat and a little boy was in the back seat.

The highway in question, known as State route 27, is the main traveled route between the Adirondack section and the main east and west highway across the State passing through Utica. Near the bridge the direction of the highway is substantially northwest and southeast, whereas, the bridge itself crosses the canal substantially northeast and southwest, making a sharp almost right-angled reverse curve in passing onto and across the bridge from either direction. Claimant was progressing along the highway in a southeasterly direction. Turning to the northeast onto the

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bridge her car swung over to the right side of the bridge and struck the planks near the right side which run lengthwise on top of the flooring of the bridge. Claimant turned the car sharply to the left, which turn carried her across to the left side of the bridge, and a front wheel became jammed behind a suspension rod. Several people came to her assistance and the machine was pulled back, straightened around, the engine cranked and she and her two companions got back into the machine. She raced the engine to see if it was in working order and had started the car forward across the bridge when the bridge structure settled slowly at one corner. Claimant, to avoid tipping over, turned the car "head on" in the direction of the settling. When the bridge struck the edge of the canal bank and stopped, part of the bridge was on the bank and part in the canal. The car was right side up, tipped sharply forward and directly against the right side of the bridge at its lowest part as it lay collapsed. The other three corners of the bridge remained substantially in place.

Claimant was thrown forward against the wheel and back against the seat. She received serious bruises about her abdomen and back. She was carried to a local hotel and was under a doctor's care for several days.

Claimant was thirty-three years old at the time of the accident and had been an actress for fourteen years. She consulted different physicians at various times and places subsequent to the accident and finally on November 16, 1914, underwent an operation. Her left kidney was found to be enlarged and two inches lower than normal. There was a sarcoma on the left ovary about the size of an egg; infiltration of the oviducts; local adhesions and a small quantity of ascites. The surgeon sutured the kidney to the abdominal wall, removed both ovaries and a large part of the uterus and fallopian tubes.

The evidence in this case shows that the bridge was not sufficient for the demands of the locality and that the State had actual notice of that condition. On February 21, 1912, Hon. D. W. Peck, Superintendent of Public Works, charged as such with the duty of maintaining and operating the canals and canal

Opinion by Fennell, J.

bridges, wrote Hon. George H. Whitney, chairman of the ways and means committee of the Assembly, a letter regarding this bridge, in which he stated: "The bridge now existing at this point was built many years ago and in spite of the efforts heretofore made by the department to make repairs to render it safe, is in poor condition. At the present time warning signs that no two vehicles may be on the bridge at the same time, have been posted. The bridge is located on the main traveled highway leading to Rome. On account of its condition it is not fit for the needs of travel at that point. The bill providing for a new bridge has my approval."

On March 13, 1912, the Superintendent of Public Works sent a letter to Governor Dix regarding this bridge which contained the following: "I am familiar with the condition of the existing structure and know that it is not safe for the heavy and constant traffic to which it is now subjected. There is no doubt in my mind but that a new bridge at this place is necessary."

The bridge was of the Whipple arch type and was too old and too light for heavy automobiles and trucks. Some of these trucks, when loaded with crushed stone for State roads, weighed eight tons. The State had actual notice of the inadequacy of the bridge. Provision was made by chapter 53 of the Laws of 1912 to build a new bridge. Fifteen months elapsed. The old bridge gave way to the damage of this claimant. Clearly the State was negligent in permitting the use of the bridge under such circumstances.

The claimant was not guilty of negligence contributing to the accident or to her injuries. Her course when she first came onto the bridge was erratic, particularly at the time her car ran into the suspension rod. However, at the time of the actual falling of the bridge, her car was in a proper place with claimant at the wheel and nothing was done by her at that time to cause the bridge to give way and settle down. It was contended by counsel for the State that the collision of claimant's auto with the suspension rod was a contributing cause to the accident. The manner of the settling of the bridge and the fact that it did not commence to settle at that point show that contention unfounded.

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From the very nature of the accident the claimant must have received a severe shaking up, but the evidence shows that she got out of the car alone; that she was attended by a physician twice upon the day she was injured and three times afterwards; that she rehearsed during the week following the accident and that the next time she consulted a physician was November 21st, which was a month and ten days after the accident. The surgeon who operated on claimant, and who was sworn on the trial on behalf of the claimant, testified on cross-examination that this sort of sarcoma or tumor was caused in about one case in a thousand by trauma. The surgeon sworn by the State testified that sarcoma was a malignant tumor; that sarcoma of the ovary is questionably due to a blow; that the ovary is suspended like a bell in the pelvic cavity and could not receive a blow direct and that traumatic sarcoma is found on organs that receive a blow direct. He also testified that sarcoma cannot be shown to be due to trauma and can only be shown by the history of the patient, and that there is no scientific proof of such origin; that one person in ten has a history of trauma who has sarcoma. It can hardly be held, under such circumstances, that the claimant has established that the sarcoma of the ovary was caused by a blow received in the accident in question.

Findings have been made accordingly.

Paris, J., concurs.

Ordered accordingly.

WILLIAM BALLINGER SMITH v. STATE OF NEW YORK

No. 13903

(Dated November 1, 1916)

Claim for Damages Resulting from the Permanent Appropriation of Land for
Barge Canal Purposes.

The land appropriated lay in the stub end of the Mohawk river resulting from the straightening of the river. The opinion in the Marian Davies

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claim, reported at page 115, covers this case except in this case all the land taken was in the old bed of the Mohawk river.

The award made in this claim is based on the understanding that the land taken was a portion of the Cosby Manor grant, and that under the decision of the Court of Appeals in the case of *Williams v. City of Utica*, 217 N. Y. 162, construing this grant, the claimant at the time of the appropriation owned it in fee.

CLAIM against the State of New York for lands belonging to claimant appropriated by the State near the city of Utica.

Theodore L. Cross, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, and Michael H. Quirk, Deputy Attorneys-General), for State.

FENNELL, J.— The property described in this claim lay in the bed of the old channel of the Mohawk river, in the stub end of the old channel left by a river straightening, and was covered with water. The opinion in the *Marian Davies* case covers this case, except, in this case, all the land taken was in the old bed of the Mohawk river.

It is understood that the property described in this claim as being in the old bed of the Mohawk is a portion of the Cosby Manor grant, so called, which grant was passed upon in the case of *Williams v. City of Utica*, 217 N. Y. 162, and the award in this claim as to the land in the old bed of the Mohawk is made upon that basis.

Ackerson and Webb, JJ., concur.

JOHN I. MUNRO v. STATE OF NEW YORK

No. 2803-A

(Dated December 6, 1916)

Claim for Damages for Personal Injuries.

On September 27, 1909, the claimant, while in the employment of the State at the Kings Park hospital, was outside the hospital grounds looking

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after some electric wires. Two attendants had fifteen or twenty insane inmates at that place working on the public highway. As claimant passed them, one of the insane inmates struck him on the head with a shovel, knocking him to the ground and permanently injuring him. From the time he was injured up to October 1, 1915, he received monthly payments from the State amounting in all to \$3,716. In May, 1915, the Legislature passed an act, which was approved by the Governor, (chapter 658 of the Laws of 1915), whereby the damage suffered by the claimant was made a valid and legal claim against the State and the same was referred to the Court of Claims for determination.

The Attorney-General contended that this act of the Legislature was unconstitutional because it revived a legal claim that had been barred by the general Statute of Limitations in violation of article 7, section 6 of the Constitution. The Court refused to uphold this contention on two grounds:

1. It was held that in the absence of the above statute the claimant would have had no cause of action against the State under the doctrine of the nonliability of charitable or eleemosynary institutions supported wholly or in part by the State or by a municipality for personal injuries sustained through the negligence or misconduct of an agent or servant of the institution; that, therefore, the claimant had no cause of action against the State until the same was created by the said statute, and that the statute was properly enacted by the Legislature under the power to validate and provide for the payment of claims otherwise not legally enforceable if they are supported by a moral obligation and founded upon justice.

2. It was further held that even if the claim could not be sustained on the above ground, the payments which the State has made to the claimant each month from the time of the injury up to October 1, 1915, were a recognition of the State's obligation and liability to the claimant, and would have been sufficient, as between citizens of the State, to take the claim outside of the Statute of Limitations and prevent its being barred by lapse of time.

The court awarded the claimant the sum of \$25,000 less the aggregate of the sums which the State had paid him from time to time since the date of his injury.

CLAIM against the State of New York for personal injuries resulting from a blow inflicted upon claimant by an inmate of a State hospital.

Baylis & Sanborn, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

ACKERSON, P. J.— The claimant herein, John I. Munro, when thirty-one years of age, with a wife and two children, was employed as a fireman by the State of New York at the Kings

Opinion by. Ackerson, P. J.

Park State Hospital at Kings Park, N. Y., in the county of Suffolk. He was receiving a salary of sixty-two dollars per month, and while he was employed as a fireman he did various kinds of work about the institution, and at the time of his injury was doing electrical work. He was a bright strong man who had never been sick and who was earning from twenty-five to forty dollars per month by doing work for other people when he was not on duty at the hospital. On the 27th day of September, 1909, he was outside the hospital grounds looking after some electric wires across the highway in front of the hospital. Two attendants at that time had fifteen or twenty insane inmates there in front of the hospital on the public highway at work. As Munro went by them, without any warning whatever and without anything being said by anybody, one of those insane inmates by the name of Sabilski struck Munro on the side of the head with a spade or shovel, knocking him to the ground. He has never recovered from the injury caused by this blow, and the testimony in the case is that he never will. The evidence shows that he is suffering from pachy-meningitis or sclerosis of the brain, and that he is totally incapacitated from doing any work. He can neither control his body nor mind, and is in such a physical and mental state that he never can do any work and cannot even take care of himself.

From the time he was injured up to October 1, 1915, he received monthly payments from the State amounting in all to \$3,716. In May, 1915, the Legislature passed an act, which was approved by the Governor, whereby the damage suffered by the claimant by reason of the assault as aforesaid by said insane inmate was made a valid and legal claim against the State and the same was referred to this court for determination.

The court has heard the evidence offered by the claimant to support his claim, pursuant to this act of the Legislature, and finds that he was damaged as a result of this injury in the sum of \$25,000.

The learned Attorney-General contends that this act of the Legislature is unconstitutional, because it revives a legal claim that has been barred by the general Statute of Limitations, in

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violation of article VII, section 6, of the Constitution. We cannot agree with the learned Attorney-General in this contention. The proposition seems to be well established that the claimant had no cause of action against the State until the same was created by statute. There is no liability on the part of a "charitable or eleemosynary institution supported wholly or in part by the State or a municipality for personal injuries sustained through the negligence or misconduct of an agent or servant of the institution. The authorities refuse to apply the doctrine of *respondeat superior* in such cases, and base the nonliability on the theory that the functions of such institutions are governmental in character and if the funds appropriated for their maintenance are used to pay damages recovered in actions for personal injuries, the purpose and usefulness of the institutions would be wholly or in part defeated." 4 L. R. A. (N. S.) 269; *Martin v. State*, 120 App. Div. 633; 105 N. Y. Supp. 540; *Gartland v. New York Zoological Society*, 135 App. Div. 163; *Woodhull v. Mayor*, 150 N. Y. 450; *Smith v. State*, 169 App. Div. 438.

The doctrine as laid down by these authorities clearly establishes the proposition that Munro had no cause of action against the State until the same was created by statute. The statute was enacted by the Legislature under and by virtue of the power which it possesses to validate and provide for the payment of illegal private claims if they are supported by a moral obligation and founded upon justice. *Wheeler v. State of New York*, 190 N. Y. 406.

However, if we should on the other hand accept the theory of the State that the claim of the claimant herein was based upon the negligence of State employees for whose acts the State is liable, it does not appear from the evidence that even in such a view of the case the claim would be barred by the lapse of time. The payments which the State has made to the claimant each month from the time of the injury up to October 1, 1915, was a recognition of the State's obligation and liability to the claimant, and would have been sufficient, as between citizens of the State, to take the claim outside of the Statute of Limitation and prevent its being barred by lapse of time.

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And so we contend that either upon the theory of the State as regards this case or upon the theory of the claimant's attorneys and the Legislature which passed the act in question, the claimant would be entitled to recover. We prefer, however, to accept the view of claimant's attorneys and the Legislature that the claimant had no cause of action against the State until the same was created by the act above referred to, because such contention seems to be founded upon good reasoning and abundant authority.

Inasmuch as the claimant not only has been ruined for life but has been placed in such a situation that he will always be a care to his friends, we believe that the damages which he has suffered fairly and reasonably amount to the sum of \$25,000, and that an award should be made for that amount less the sums which the State has paid him since the date of his injury.*

Cunningham and Paris JJ., concur.

MALVINA BEEMAN v. STATE OF NEW YORK

No. 2530-A

(Dated December 7, 1916)

Claim for Damages for Personal Injuries on Canal Bridge.

Claimant had for several years travelled between Schenectady and Rotterdam Junction on a forty passenger auto bus. On April 24, 1915, she, with other people, boarded this bus at Schenectady, paid her fare and became a passenger. While proceeding westerly on a State highway, the bus passed on to the bridge over the Erie canal known as Van Slyke's bridge. The bridge suddenly collapsed carrying the bus and occupants down about twenty feet to the canal bed injuring the claimant and other passengers.

Six years before the accident the section superintendent in the employ of the Superintendent of Public Works had placed sign boards near each end of the bridge. The notice on the sign boards was the usual notice signed by the Superintendent of Public Works that loads of more than two and one-

* Upon appeal by the State to the Appellate Division, 3d Department, the judgment of the Court of Claims was affirmed with costs. The prevailing opinion of the Appellate Division by Woodward, J., will be found in this volume at page 326, and the dissenting opinion by Cochrane, J., concurred in by Lyon, J., will be found in this volume at page 329.

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half tons were forbidden to cross the bridge. At the time of the accident one of the signs remained near the Rotterdam end of the bridge but there was no proof that the sign board at the Schenectady end was in place at that time.

From the evidence, including a very careful inspection of the pieces of bridge timbers introduced in evidence as exhibits, the Court held that the bridge was not only unsafe for a two and one-half ton load but was unsafe for any load, and that the State could have discovered this condition by a proper test, but that no such test was ever made.

Claimant had passed over the bridge in this forty passenger auto bus several times a week for several years and to all appearances the bridge would hold much more than two and one-half tons for she had been many times a part of a load much heavier than two and one-half tons which had gone safely over the bridge. The Court held that, whatever the form of the notice, the fact that traffic was not actually stopped over the bridge gave the notice the character of a warning of its not being safe for more than two and one-half and could not be taken as a prohibition to use the bridge for more than two and one-half tons.

If the Superintendent of Public Works knew or had reason to believe that the bridge was not safe for loads weighing more than two and one-half tons it was his duty to have a test made and find out what was the actual condition of the bridge. If found to be in a dangerous condition for two and one-half tons or any other usual load which might be expected to pass over such a bridge in such a place, he should cause to be put up signs to attract the attention of all persons who might desire to use the bridge, and then within a reasonable time, make such repairs, changes or replacements as would make the bridge a proper bridge for the traffic to be accommodated at that locality at that time. Small sign boards placed over to one side of the road and left there for five years do not constitute the kind of protection to which the citizens of this and other states are entitled when they are passing over bridges built, owned and maintained by the State of New York.

The claimant, a married woman living with her family and doing the housework, was severely injured. She suffered a fractured skull, had teeth knocked out, received a large deep tear in the forearm and other injuries. An award was made to her in the sum of \$3,500.

CLAIM against the State of New York for injuries sustained while passing over an Erie canal bridge on a State highway.

Rockwood & McKelvey, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.—Claimant was injured in April, 1915, by the falling of a bridge over the Erie canal on the State highway between Schenectady and Rotterdam Junction. An auto bus made

Opinion by Fennell, J.

regular trips between Schenectady and Rotterdam and return. A number of people boarded this auto bus at Schenectady, among them being claimant. She paid her fare and became a passenger on the auto bus. It then proceeded on its way toward Rotterdam, along the one main highway, which is also a State highway, between that place and Schenectady. About five miles west of Schenectady the highway passes over an Erie canal bridge, known as Van Slyke's bridge. This bridge was of the Whipple type,—the usual type of canal bridges. It had a span of about seventy feet. The arches or compression members of each truss were formed of eight by twelve inch white pine timbers. The top of each arch consisted of a long horizontal member supported at each end by end pieces which ran diagonally downward to the edge of the embankment. Some distance in from the toe of each arch two other diagonals ran up to the top member, and between the tops of these latter diagonals extended another white pine timber. This construction made the middle part of the upper member of the arch of double thickness. The toe of the diagonal end piece where it rested on the embankment was fitted into an iron block. Tension rods passed from one iron toe block to the other iron toe block of the same truss on the other embankment of the canal. The bridge was built in 1902. Various repairs had been made to the bridge from time to time, but none of the main compression members consisting of the diagonal end pieces and the top chords had ever been repaired or renewed.

As the auto bus was passing on to the bridge the bridge suddenly collapsed carrying the bus and occupants down about twenty feet to the canal bed.

On May 26, 1909, six years before the accident, James Scanlon, section superintendent, had sign boards made and put up near each end of the bridge. These sign boards were fourteen inches high, thirty-six inches long, were painted white and the letters forming the notice were black. At the time of the accident one of these signs remained near the Rotterdam end of the bridge but there is no proof that the sign board at the Schenectady end was in place at that time. The notice on the sign boards was the usual notice signed by the Superintendent of Public Works that loads

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of more than two and one-half tons were forbidden to cross the bridge.

There are two vital questions in this case.

First. Was the bridge in a dangerous condition and did the State know, or should it have known, of that condition?

Second. Was the claimant guilty of contributory negligence in using the bridge as a passenger in an auto bus while such sign or signs were posted near the bridge?

After the bridge had fallen portions of the compression members were sawed off and were presented as evidence in court on the trial. It was plainly apparent that while the outside of these members looked to be in fairly good condition, due to their being kept painted, many of them were in fact merely shells. Some portions of these compression members produced in court, including the diagonal end pieces, were so rotten inside that witnesses in the presence of the court easily pulled them apart and crumbled them in their fingers. The court gave a very close inspection to the pieces of timber in evidence. From the actual rotten condition of these timbers it seems incomprehensible that the bridge stayed up in place at all. What kept it here, unless it was the force of habit or the grace of God, remains a mystery. It was testified by bridge experts on the trial that bridges will stand a very heavy load at one moment and shortly after fall under a much lighter load. In a case recently decided by this court a heavy auto truck loaded with crushed stone passed across the canal bridge at Boonville, and a few minutes later the bridge went down under a light Ford automobile. There is no question in the mind of the court that this bridge was not only unsafe for a two and one-half ton load but was unsafe for any load. This condition could have been discovered by a proper test. No such test was ever made.

Auto bus service between Schenectady and Rotterdam had been in operation for several years. The bus which fell into the canal and its predecessor had been making the round trip several times a day for several years. There were three bridges between Schenectady and Rotterdam and claimant may or may not have read these warning notices. She had been traveling over this

Opinion by Fennell, J.

road and bridge in an auto bus for several years. The warning signs had been up some six years. Claimant had passed over the bridge in this forty passenger auto bus several times a week for several years and to all appearances the bridge would hold much more than two and one-half tons for she had been many, many times a part of a load much heavier than two and one-half tons which had gone safely over the bridge. Whatever the form of the notice, the fact that traffic was not actually stopped over the bridge, gave the notice the character of a warning of its not being safe for more than two and one-half tons and cannot be taken as a prohibition to use the bridge for more than two and one-half tons.

The outside of the timbers being apparently firm and hard and heavy loads passing and repassing many times a day over this bridge during a number of years would lead those using the bridge to believe that it was safe for a much heavier load than two and one-half tons. If the Superintendent of Public Works knew or had reason to believe that the bridge was not safe for loads weighing more than two and one-half tons it was his duty to have a test made and find out what was the actual condition of the bridge. If found to be in a dangerous condition for two and one-half tons or any other usual load which might be expected to pass over such a bridge in such a place, he should cause to be put up sufficient signs to attract the attention of all persons who might desire to use the bridge, and then, within a reasonable time, make such repairs, changes, or replacements as would make the bridge a proper bridge for the traffic to be accommodated at that locality at that time. If the State authorities who caused these warning signs to be placed at these bridges knew that the bridges were unsafe for loads of more than two and one-half tons, and still permitted the bridges to continue in that condition for six years, it would seem that such a procedure was in fact an attempt to provide a defense of contributory negligence in some future litigation, if such a bridge should fall, instead of providing a safe substantial bridge as demanded by the traffic at that place.

Families from all over America are touring the State highways of New York State all summer long. They are passing over

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these canal bridges along our great central State highways. They are entitled to have a dangerous bridge properly so noticed or barricaded. Small sign boards placed over to one side of the road and left there for five years do not constitute the kind of protection to which the citizens of this and other States are entitled when they are passing over bridges built, owned and maintained by the State of New York.

It is difficult to determine just how far the auto bus had gotten onto the bridge when it fell. Most of the witnesses testified to three or four feet. Mrs. Olive King stated she was on the fourth seat from the front and that the bridge fell just as she got onto it. Photographs showing the auto bus standing right side up in the bed of the canal and entirely clear of the abutment, would indicate that it had gotten pretty well onto the bridge when it fell. This latter is a deduction and while reasonably strong can hardly be taken as conclusive proof against a large number of witnesses, even if most of them, having been passengers, are interested in the event of this litigation. The bridge timbers were so rotten that the bridge might well have started to fall as soon as any appreciable load, particularly a moving load, started over it.

The claimant, a married woman living with her family and doing the housework, was severely injured. She suffered a fractured skull, had teeth knocked out, received a large deep tear in the forearm and other injuries. An award has been made to her in the sum of \$3,500.

Cunningham J., concurs.*

* Upon appeal by the State to the Appellate Division, 3d Department, the judgment of the Court of Claims was unanimously affirmed with costs. No opinion. 179 App. Div. 964.

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LANELLE M. SHEARMAN v. STATE OF NEW YORK

No. 2647-A

THOMAS A. SHEARMAN v. STATE OF NEW YORK

No. 2648-A

(Dated December 21, 1916)

Claim for Personal Injuries Resulting from an Automobile Accident on a State Highway.

The claimants, husband and wife, started out on an automobile trip. The wife had their only child, about three years old, on her lap. Proceeding northerly from their home in Cortland they passed on to that portion of the Pompey-Jamesville State Highway known as Barrows Hill. This highway was being resurfaced with a mixture of oil and stone. It was maintained by the State under the patrol system. The husband, in driving over the newly placed oil and stone on the road south of Barrows Hill, had found it hard and good wheeling, but too much oil had been placed on some portions of the easterly side of the macadam leading down Barrows Hill, producing a slippery and dangerous condition. As the car started down Barrows Hill the hind wheels slewed to the right and off on to the dirt roadway to the east of the macadam, and the right front wheel also went off the macadam. The husband swung the front of the car to the right and thus brought the four wheels on to the dirt portion of the roadway. The machine was in high gear. He then turned the front wheels to the left and put on more gas. The left front wheel got into a groove between the macadam and the dirt, and the car proceeded down the hill with the left front wheel grinding against the stone shoulder. Suddenly the left front tire was torn from the wheel, the machine started to the left and diagonally across the macadam, the back end slewed to the right on oily surface, and finally rolled over as it approached the westerly side of the macadam which had much less oil on it and was therefore much dryer. The claimants were seriously injured.

There were two phases of the accident — the slewing off the macadam and the slewing across the road after the car got back on again. The Court held that the first slewing was caused directly by the negligence of the State; that the second was the result of the State's negligence both in the original slewing and the slippery condition where the second slewing occurred, but that the husband was also negligent in putting on power and trying to push over the shoulder without first putting on his brakes and getting into lower gear, and that his contributory negligence barred his recovery.

The Court held, however, under the authorities in this State, that the negligence of the husband could not be imputed to his wife, and made an award in her favor in the sum of \$9,000.

The State contended that the work of oiling and stoning was the work of an independent contractor and not having been accepted by the State at the

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time of the accident, the State was relieved from liability. The Court held, however, that the State could not thus relieve itself from liability. The evidence showed that the road remained in control of and under the jurisdiction of State authorities, and was actually being inspected and patrolled by them while the work was in progress; in addition, the road was at the time of the accident open for public travel.

CLAIM against the State of New York resulting from injuries received on a State high road which was being negligently repaired by a contractor for the State.

Clayton R. Lusk and John Shay, for claimants.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.— These two claims grew out of the same accident and are discussed together in this opinion.

On July 30, 1915, claimant was injured in an automobile accident which occurred on that portion of the Pompey-Jamesville highway, No. 669, known as Barrows Hill, about one and one-quarter miles north of the hamlet of Pompey in the county of Onondaga. Said highway was maintained by the State under the patrol system. On May 14, 1915, a contract was let by the State of New York to Dana W. Robins, Inc., providing for the repair of sections of certain highways including the one above mentioned. This repairing was in fact a top-coating of oil and stone in the proportion of one-fourth of a gallon of oil and eighteen pounds of stone to the square yard. This proportion would make the oil one-twenty-second of an inch thick (the thickness of a ten-cent piece) and the stone about one-fourth of an inch thick.

In doing the work on Barrows Hill the westerly side of the road was oiled first and stone scattered over it; then the easterly side was oiled next and stone scattered over it. There was a greater proportion of oil placed on the easterly side than was called for in the specifications and contract. This disproportion was so great on certain portions of the easterly side of the macadam on Barrows Hill that it produced a slippery and dangerous condition.

Opinion by Fennell, J.

Claimants were starting out on an automobile trip in a six-cylinder roadster, weighing about 3,500 pounds. Claimant Lanelle M. Shearman was holding their only child, about three years of age, in her lap. Proceeding northerly from their home in Cortland they came onto the road which was being resurfaced with oil and stone and passed along and over same to Barrows Hill. The car was proceeding at the rate of about twenty miles an hour when it started down Barrows Hill. On Barrows Hill the highway consists of a macadam road in the center with a dirt roadway or shoulder on each side. On the easterly side—being the down-hill traffic side—the dirt next to the macadam was worn away, leaving a groove next to the macadam varying from three and one-half to five and one-half inches deep and also varying in width. This groove was worn by the drivers of loaded wagons driving with one wheel off the macadam and in the edge of the dirt as a help in holding back the wagon on the hill, and also as an additional way of braking by cramping the front wheel of a loaded wagon against the stone edge or shoulder.

Just after the car started down Barrows Hill the hind wheels slipped on the oily surface and slewed to the right and off the macadam part of the road; the right front wheel also went off the macadam. Claimant Thomas A. Shearman swung the front of the car to the right and this brought the four wheels of the car on to the dirt shoulder of the road. The machine was in high gear. Mr. Shearman then turned the front wheels of the car to the left and put on more gas. The left front wheel got in the groove mentioned and crowded against the stone edge of the macadam portion of the highway. The car proceeded down the hill, which hill has a 7 per cent grade, with the left front wheel so grinding against the stone shoulder for a short distance when, suddenly, the left front tire was torn from the wheel and the machine started to the left and diagonally downward across the road, the left front iron rim cutting a groove in the macadam portion of the road. The back end of the car slewed to the right on the oily surface of the easterly side of the road and the car continued in this way until near the westerly side of the macadam it rolled over and finally

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stopped, right side up pointed up the hill near the bank which formed the westerly edge of the dirt shoulder on the westerly side of the road.

Claimants were severely injured. Their only child which Mrs. Shearman was holding on her lap was uninjured. At the time of the accident claimant, Mrs. Lanelle M. Shearman, was thirty-two years of age, was five feet seven and one-half inches tall, weighed about 150 pounds, had had no previous injuries and was in good physical condition. Her injuries due to the accident were as follows: left wrist sprained; contusion left elbow; contusion left hand; contusion left side forehead and temple; contusion right leg between knee and ankle; seven-inch cut on left leg; wound on instep; fracture of the coccyx; fracture of the eleventh rib on the left side; fracture transverse process first and second lumbar vertebra; fracture of the left remus of the ischium and consequent overlapping of one-half inch; dislocation of the sacro-iliac joint about one-half to three-quarters of an inch, thus tipping the pelvic bones and making the left leg one-half to three-fourths of an inch shorter than the right and causing a curvature of the spine. The fractures, dislocations and curvature mentioned were shown by X-ray plates. The shortening of the leg and curvature of the spine are permanent. Claimant suffered very severe pain for a long time. She struck the road or was struck by the rolling car with such great force across the lower portion of her back that three blood tumors formed and had to be drained. In attempting to walk she fell a number of times. The nerves which control the muscles of her left leg pass out through the opening which was made smaller and deformed by the fracture of the ischium.

The injuries of claimant Thomas A. Shearman consisted of a broken nose, leaving a permanent scar on top of nose; sternum-clavicular dislocation; fracture and crushing in of sternum; concussion of brain; fracture of skull; injury to muscles of back and neck; many contusions and lacerations, some of which were filled with dirt and oil, all of which produced a severe nervous shock.

The evidence in this case shows that the easterly side of the macadam portion of the road on Barrows Hill had much too large a percentage of oil to the amount of stone used; also that the oil

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and stone placed on the road on the same highway to the south of Barrows Hill produced a firm dry surface. Mr. Shearman driving over this newly placed oil and stone to the south of Barrows Hill and finding it hard and good wheeling naturally expected the remainder of the same road, being resurfaced at the same time, to be in substantially the same condition. Of course the State had the right to oil the entire macadam portion of the highway and put no stone on it, in which case the driver of an auto could see his danger all the time. The condition of the resurfaced macadam south of Barrows Hill led the claimant into a theretofore undisclosed dangerous place, especially going down a hill with a 7 per cent grade. Had the road on Barrows Hill been in the same condition as the road to the south thereof the speed of about twenty miles an hour might not have been at all excessive. When the auto slewed off the macadam onto the dirt portion of the road Mr. Shearman and his family were put in a dangerous position. The principle of law that a party who places another in peril cannot complain if he does not exercise the best judgment in extricating himself from such peril (*Voak v. N. C. R. R. Co.*, 75 N. Y. 320) is not quite applicable to this case. It is true the negligence of the State placed the occupants of the Shearman car in a dangerous position, and if he was forced by the then circumstances to make a quick choice of alternative dangerous courses he would not be held necessarily to the best choice. But in this case when the rear wheels slewed off the macadam and he turned the left front wheel also onto the dirt shoulder the reasonable thing for him to have done was to put on his brakes, get into low gear and then get back on the macadam if he chose, proceeding with care down the 7 per cent grade. He had come over some miles of resurfaced road and found it all right for normal speed or more, but he found from the sudden slewing of the car, it being a bright clear day, that there was a slippery oily condition. He had, therefore, reason to expect that there might be other oily slippery spots on the hill. He had his wife and their only child with him. Reasonable prudence would have dictated brakes and low gear. Had the auto been still on the slippery macadam the use of the brakes might have been bad judgment, but he was off the macadam and on the

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dry dirt shoulder. Mr. Shearman was not charged with notice of the sharp stone shoulder at the edge of the macadam. It was not such a shoulder that a high-powered car could not well get over, but his method of attempting to get over it was an improper one. The tearing off of the left front tire might have been due to a number of causes, the most probable being the application of more gas, meaning extra power, plus the weight of the car and occupants on the 7 per cent down grade, all making a diagonal drag across the left front tire as it was pushed against the sharp stone edge of the shoulder of the macadam and slipped along parallel with the shoulder and pressing powerfully against it. When the tire did finally rip off, the iron rim dug into the macadam and formed a sort of drag on the left front part of the car, causing the car to slew on the oil in an arc around this rim made line as a base, and finally the momentum of the car moving sidewise and meeting the resistance of the dry surface on the west side of the road, rolled over and stopped, right side up, pointing up the hill and near the westerly bank forming the westerly side of the road. It is difficult to say just how much the slippery condition of the roadway where the car got back on it again had to do with the final tipping over and consequent injuries. It certainly was a large causative factor. Whatever Mr. Shearman might have done thereafter to prevent the accident was absolutely cut off by the slewing around on the slippery surface and thus taking all control out of his hands. From that moment he was helpless.

The two phases of this accident — the slewing off the macadam and the slewing across the road after the car got back on again — while distinct, occurred in a very brief period of time, seconds at the most. The first slewing was caused directly by the negligence of the State. The second was the result of the State's negligence both in the original slewing and the slippery condition where the second slewing occurred, but Mr. Shearman was also negligent in putting on power and trying to push up over the shoulder without first putting on his brakes and getting into low gear. His contributory negligence bars his recovery.

Mr. Shearman's contributory negligence does not bar his wife's recovery. *Hoag v. N. Y. C. & H. R. R. Co.*, 111 N. Y. 199, and

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the decisions following are authority for the holding that his negligence cannot be imputed to her. They had traveled many miles together and she regarded him as a competent, careful driver. When the emergency arose she could not be required to seize the steering wheel or interfere with the driver. That would make matters worse. Besides her whole attention would and should be given to their child, about three years old. That she was giving her whole attention to the child may be concluded from the fact that she was holding the child in her lap and that while the child came through unhurt the mother was made a cripple for life.

It is contended that the work of oiling and stoning was the work of an independent contractor and not having been accepted by the State at the time of the accident, the State was relieved from liability. We cannot agree with this contention. The State cannot thus relieve itself from liability. The road remained in control of and under the jurisdiction of State authorities and was actually being inspected and patrolled by them while the work was in progress and, in addition, this road was at the time of the accident open for public travel. The case of *Turner v. City of Newburgh*, 109 N. Y. 301, would seem to be conclusive on this point.

While Mr. Shearman's injuries were very severe and, in addition, he had been put to a very large expense because of the injuries to his wife, himself and damages to his car, still we feel that his own negligence contributed toward the accident and his claim should be dismissed.

Without the State's negligence this accident would not have happened, and while Mr. Shearman's negligence bars his recovery his negligence cannot bar his wife's recovery. Her injuries, as above stated, were very serious, and her crippled condition will be permanent. We have made an award to her in the sum of \$9,000.

Ackerson, P. J., concurs.*

* Upon appeal by the State to the Appellate Division, 3d Department, the judgment of the Court of Claims was affirmed. All concurred except Cochrane and Sewall, JJ., dissenting. No opinion.

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FILED WITH THE

COURT OF CLAIMS

IN THE YEAR 1916

[167]

**Retired Judges of the Court of Appeals Acting During the
Year 1916 as Official Referees Under Chapter 229 of the
Laws of 1911**

Hon. Albert Haight, Buffalo, N. Y.

Hon. Irving G. Vann, Syracuse, N. Y.

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FILED WITH THE

COURT OF CLAIMS

IN THE YEAR 1916

I. M. LUDINGTON SONS, INC., v. STATE OF NEW YORK

No. 1552-A

(Filed April 6, 1916)

Claim for Damages on Barge Canal Contract

On the 11th of August, 1910, the claimant entered into an agreement with the State of New York, known as Contract 62, pursuant to chapter 147 of the Laws of 1903 and the acts amendatory thereof, to improve the Erie canal from the west line of Monroe county to the east end of Contract 29 at Eagle Harbor, a length of 14.15 miles, based upon estimates of quantities and information for proposals and specifications for preliminary estimates of quantities and costs embraced in sheets 1 to 140, inclusive, made by the State, and the bids or itemized proposal made by the claimant. Upon the execution of the contract the claimant entered upon the performance thereof and substantially completed the same on February 24, 1914, at which time it was conditionally accepted by the State, and subsequently a final estimate was made by the State Engineer upon which there was paid to the claimant the sum of \$2,831,933.66. The claimant, however, under protest performed certain work under various alteration orders and extra work orders which increased the expense to it of doing the work under the original contract, and there were also various delays in connection with the work done under the contract resulting from changes made by the State in the original plans as the work progressed.

The referee passed upon the following questions and items at the pages of his report and opinion indicated below:

- I. Statute of Limitations.
Report, p. 177; Opinion, p. 194.
- II. Holley Trough and Extra Costs of Construction.
Report, p. 178; Opinion, p. 195.
- III. Rubble Masonry.
Report, p. 180; Opinion, p. 197.
- IV. Hindsburg Bridge.
Report, p. 182; Opinion, p. 199.
- V. Lattin's Guard Gate.
Report, p. 184; Opinion, p. 201.
- VI. Culvert No. 73½.
Report, p. 185; Opinion, p. 202.
- VII. Cofferdam, Pumping, Bailing and Draining.
Report, p. 186; Opinion, p. 203.

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VIII. Premium upon Bond and Overhead Expenses.

Report, p. 188; Opinion, p. 208.

IX. Maintaining Navigation.

Report, p. 189; Opinion, p. 212.

X. Maintaining Highway Traffic.

Report, p. 190; Opinion, p. 212.

XI. Stone Crusher.

Report, p. 191; Opinion, p. 214.

XII. Interest.

Report, p. 191; Opinion, p. 214.

CLAIM against the State of New York for extra compensation on a Barge canal contract alleged to be due the contractor under various alteration orders and extra work orders, and for damages for delays resulting from changes made by the State in the original plans as the work progressed.

Egburt E. Woodbury, Attorney-General (Alfred L. Becker, Deputy Attorney-General), for State.

Lewis, McKay, McMillan & Bown, for claimant.

REPORT BY HON. ALBERT HAIGHT, OFFICIAL REFEREE.

To the Honorable, the Court of Claims of the State of New York:

I, the undersigned referee, appointed pursuant to an order of the Court of Claims bearing date April 21, 1915, entered upon the stipulation of the Attorney-General with the attorneys of the claimant herein, pursuant to chapter 229 of the Laws of 1911 (a copy of which stipulation is herewith returned to be filed), to hear, try and determine the questions involved between the parties, do respectfully report:

That on the 28th day of May, 1915, at my office, 307 Electric building, Buffalo, N. Y., there appeared before me, pursuant to notice, Lewis, McKay, McMillan and Bown, by Clarence W. McKay, Esq., attorney for claimant, and Egburt E. Woodbury, Attorney-General, by Alfred L. Becker, Esq., deputy, for the State of New York, and thereupon the case being called for trial, the oath of the referee was waived by the parties and the case continued from time to time upon divers subsequent days and by adjournments by consent of parties with hearings held in my office in the city of Buffalo, and at the Court House in the city of Rochester,

Report by Hon. Albert Haight

until the 29th day of January, 1916, at which time the evidence was closed and oral arguments by the respective counsel were made and thereupon it was agreed that the case would be submitted upon briefs with requests to find to be thereafter forwarded to me. That such briefs and requests to find were finally received by me on the third day of March, 1916, at which time it was fully submitted for determination.

Now, After hearing Alfred L. Becker, Deputy Attorney-General, on behalf of the State, and Clarence W. McKay on behalf of the claimant, and due deliberation being had, I do find and decide as follows:

FINDINGS OF FACT

GENERAL

On the 11th day of August, 1910, the claimant, I. M. Ludington Sons, Inc., of Rochester, N. Y., entered into an agreement with the State of New York known as contract 62, pursuant to chapter 147 of the Laws of 1903 and the acts amendatory thereof, to improve the Erie canal from the west line of Monroe county to the east end of contract 29 at Eagle Harbor, a length of 14.15 miles, based upon estimates of quantities and information for proposals and specifications for preliminary estimates of quantities and costs embraced in sheets 1 to 140 inclusive made by the State and the bids or itemized proposal made by the claimant, a copy of which is made a part of this report and filed herewith.

Upon the execution of the contract the claimant entered upon the performance thereof and substantially completed the same on the 24th day of February, 1914, at which time it was conditionally accepted by the State and subsequently a final estimate was made by the State Engineer upon which there was paid to the claimant the sum of \$2,831,933.66.

I

STATUTE OF LIMITATIONS

FACTS

On the 6th day of May, 1914, the claimant filed with the Board of Claims, the jurisdiction of which is now vested in the Court of Claims, a notice of claims upon various items for work, labor

I. M. Ludington Sons, Inc., v. State of New York

and services performed and materials purchased and supplied in completing the contract, and again on the 20th day of May, 1915, at the commencement of the trial of the case before the referee, the claimant filed an amendment to the claim by adding thereto several different items of damages which it is claimed had been suffered by the contractor in the progress of the work provided for under the contract. The final estimate made by the engineer was filed on July 14, 1915.

CONCLUSIONS OF LAW

I find as conclusions of law the claims made against the State were filed in due time and are not barred under the Statute of Limitations.

II

HOLLEY TROUGH AND REINFORCED CONCRETE

FACTS

1. Under the original contract and specifications there were designed concrete constructions across ravines at Holley and Eagle Harbor consisting of side walls and floor to carry the canal across ravines. These were designed to be built of second-class concrete. The structures were commonly known and will be hereafter designated respectively as the Holley and Eagle Harbor troughs.

2. After the contractor had commenced construction of the troughs, the State changed the plan of construction and by an order known as "Alteration Order No. 1" duly approved by the Canal Board as required by the contract, extended and deepened the Holley trough and the Eagle Harbor trough. The Holley trough was extended in length for a distance of 967 feet, its original length under the contract being 1,112 feet, making a total length of the trough of 2,079 feet. The alteration order also changed the plan of construction by inserting three-quarter-inch deformed metal bars 10 feet 3 inches in length extending 7 feet in the footing course of the side walls of the trough, then bent upwards so as to come on a level with the sub-concrete part of the floor and imbedded therein. These bars were spaced 12 inches

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from center to center horizontally throughout the entire length of wall on either side, and in accordance with the plans accompanying the alteration order were to be at a specified distance between the base of the footing course and the center of the lower course of the floor. Under the order the lower layer of concrete was to be 12 inches thick, on top of which there was to be placed a layer of water-proofing one-half inch thick and upon that a layer of sand 6 inches thick and upon the top of that a layer of concrete 4 inches thick. The footing course of the walls was to be extended downward 12 inches and widened out so as to extend under the side of the floor so as to form a shoulder upon which the floor might rest at the point of its contact with the walls.

3. The contractor immediately upon receipt of the alteration order protested against constructing the concrete in which the deformed bars were to be imbedded at second-class concrete prices, claiming that the part of the concrete adjacent to the bars was reinforced concrete construction and that he was entitled to payment therefor at reinforced concrete prices. The contractor, however, after making the protest, constructed the walls and floor, inserting the reinforced metal bars in accordance with the requirements of the specifications.

4. The contract provides "It is mutually agreed that the State reserves the right until the final completion and acceptance of the work to make such additions to or deductions from such work or changes in the plans and specifications covering the work as may be necessary and the contract shall not be invalidated thereby; and the contractor shall do and complete the work in accordance with such additions to or deductions from or changes in the plans and specifications, and no claim shall be made by the contractor for any loss of profits because of such change or by reason of any variations between the quantities of the approximate estimate and the quantities of work as done and the amounts of payment for such work shall be based upon item prices specified in this contract, if there be such, but if such additions, deductions or changes shall require the furnishing of items of labor or material or both, other than those for which prices are fixed, the contractor shall nevertheless perform the work and furnish the materials when

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properly ordered so to do and the compensation therefor shall be determined by the contract price of similar items, if there be any such as far as may be, and if there be no item price of similar nature, then compensation shall be fixed by mutual agreement, based upon the market price so far as such price may be made applicable thereto."

5. The State has paid the contractor for the concrete immediately surrounding the bars at the rate of \$7.50 per cubic yard.

6. The claimant incurred extra expense in constructing 1,482.6 cubic yards of concrete in which the bars were imbedded, of \$3.50 per cubic yard, amounting to the sum of \$5,189.10.

CONCLUSIONS OF LAW

1. The contractor had the right to enter his protest against the classification of the concrete as second-class, and after making the protest to proceed with the work relying upon his right to recover the additional expense.

2. The contractor is entitled to recover the sum of \$5,189.10.

III

RUBBLE MASONRY

FACTS

1. The original contract called for the construction 5,125 cubic yards of rubble masonry. After the contractor had started work the rubble masonry was increased by alteration orders Nos. 2, 4 and 6, approved by the Canal Board, to 25,634 cubic yards but in the final estimate the contractor was allowed for 25,821.3 which had actually been constructed.

2. The contract price for rubble masonry was \$4 per cubic yard and the contractor had been paid at that rate and no more.

3. The reasonable value of the labor and materials for the construction of the rubble masonry exclusive of extra excavation, bailing and draining, was \$5 per cubic yard.

4. The contractor protested against the construction of the increased amount of rubble masonry upon the ground that it was an unreasonable increase; that the contractor could not construct it at the contract price without much loss and that the State had no right to increase the amount over the 15 per cent. of that

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required by the original contract. That for all above that amount the contractor would claim added price commensurate with the value thereof, and following such protest, constructed the masonry required.

Upon the trial the parties stipulated as follows:

“It is stipulated, That if the Referee should determine that the Claimant is entitled to recover under item No. 2 of the Claim for the portion of said item relating to Rubble Masonry, exclusive of extra excavation, bailing and draining, the amount to which the Claimant is entitled under said items is \$19,927.55. It is stipulated that a fair and reasonable method of computing the amount of such liability (if found by the Referee) is as follows:

“Take the amount of yardage called for by the original contract and plans, viz. 5,125 cubic yards, add 15 per cent of that amount, or 768.75 cubic yards, as a reasonable addition to such additional yardage which the State would have the right to require the contractor to perform at the contract price, making a total of 5,893.75 cubic yards for which the contractor has been fully compensated by the payment of the contract price of \$4 per cubic yard. Deduct this amount from the total yardage of Rubble Masonry as fixed in the Final Estimate, viz. 25,821.3 cubic yards and allow the contractor compensation for the remainder, or 19,927.55 cubic yards at the rate \$5 per cubic yard, same being the reasonable market value of such excess quantities. The contractor having already been paid at the rate of \$4 per cubic yard for the total yardage, the amount due the contractor, if liability is found to exist is as stated above, viz. \$19,927.55.

“This stipulation is made for the purpose of the present trial only.”

CONCLUSIONS OF LAW

1. The contractor had the right to enter his protest against the unreasonable increase in rubble masonry and after making the protest to proceed with the work relying upon his right to recover the additional price.

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2. The increase of rubble masonry over 5,125 cubic yards to 25,821.3 cubic yards was not reasonable within the meaning of the contract, giving the State the right to make alterations, additions and changes as the work progressed. That 15 per cent of the original 5,125 cubic yards, or an increase of 768.75 cubic yards, would have been a reasonable increase, and as to that amount, namely 5,893 cubic yards, the contractor was obliged to construct the same at the contract price of \$4 per cubic yard. As to the remainder, namely 19,927.55 cubic yards, the contractor is entitled to additional compensation at the rate of \$1 per cubic yard, or \$19,927.55, the amount agreed upon by the parties in their stipulation, and consequently the claimant is awarded that amount.

IV

HINDSBURG BRIDGE

FACTS

1. Under the provisions of the original contract the contractor was required to construct a steel highway bridge over the canal known as bridge 121 at Hindsburg, N. Y. Pursuant to such provisions the contractor made arrangements with the Lackawanna Bridge Company to furnish the material, fabricate the bridge and install it during the closed season of navigation of 1911-12 and have it completed before the opening of navigation in May, 1912. A tentative order for that purpose was placed with the Steel Company who prepared working plans from the original specifications furnished by the State and completed the same on or before December, 1911; it being reported, however, that the Engineering Department contemplated a change in the plans of the bridge, a letter was written to the Department making inquiry with reference thereto and under date of February 28, 1912, an answer was received by the contractor changing the plans of the said bridge from the original specifications which plans were set forth in the State Exhibit No. 2 which is hereby made a part of this finding.

2. The changes required by State's Exhibit No. 2 necessitated the re-drafting of a portion of the plans and alterations to be made in the remainder of the plans.

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3. The contractor proceeded to revise the plans and within a reasonable time thereafter, namely, on the 25th day of March, 1912, submitted the revised drawings to the Engineering Department of the State. The revised plans were finally approved and accepted by the Engineering Department on the 12th day of May, 1912, at which time it was impossible for the contractor to obtain the materials and complete the construction of the bridge prior to the opening of navigation or to complete it during the period of navigation until the 15th of November, 1912.

4. The contractor was obliged to and did maintain navigation and highway traffic at the Hindsburg Bridge from May 15th to November 15, 1912, and the reasonable cost and value of maintaining such navigation and highway traffic, including 15 per cent profit, was the sum of \$2,017.11.

5. The maintenance of such navigation and highway traffic was rendered necessary by reason of the delay on the part of the officers of the State in changing the plans of the bridge until the 28th of February and in the failure to approve the plans prior to the 12th day of May, 1912.

6. The reasonable cost and value of revising the plans in accordance with the instructions from the Engineering Department was \$267.84.

CONCLUSIONS OF LAW

1. The failure of the State to notify the contractor of the changes required until the 28th of February, 1912, and approve the plans submitted by the contractor until May 12, 1912, necessitated an unreasonable delay of the contractor in the performance of his work from which he was put to additional expense in maintaining navigation and highway traffic for which he should be compensated.

2. The contractor is entitled to recovery from the State in the sum of \$2,017.11 as expenses for maintaining highway traffic and navigation during the season of 1912 and the sum of \$267.84, the cost and value of making the changes in the plans, amounting to the sum of \$2,284.95, which sum is hereby awarded.

V

LATTIN'S GUARD GATE

FACTS

1. Under the provisions of the contract a structure known as Lattin's Guard Gate was to be constructed according to the original plans, to be built upon a pile foundation. During the building of the north abutment in the spring of 1912, it was discovered that a solid earth foundation known as "Red Horse" existed at a point a half foot lower than the original foundation was designed to extend and by oral directions of the engineer the piles were eliminated under the foundation of the north abutment and the concrete foundation constructed, resting upon the solid "Red Horse."

2. Prior to the close of navigation in 1912 the contractor sought to ascertain from the engineer in charge of the work whether or not the pile foundation would be eliminated under the middle and south abutment and the concrete extending to the red horse foundation substituted therefor. At first he was advised by the resident engineer that the piles would be eliminated but subsequently the division engineer overruled the resident engineer, dispensing with the piles and therefore the contractor had no direction upon the subject until after the close of navigation, but during the following winter orders came to him from the engineer directing that the piles be eliminated from the foundation of the middle and south abutments and that concrete be substituted therefor, extending down to the layer of "Red Horse."

3. By reason of the order dispensing with the piles and substituting concrete the contractor was obliged to build 313 yards additional concrete foundation. The materials for 243 yards had to be hauled after the close of navigation during the winter time from Eagle Harbor and vicinity at an expense largely in excess of that required during the open season of navigation, and 70 yards after the opening of navigation with the total additional expense of \$459.09.

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4. By reason of the change in the foundation of the middle and south abutments of the guard-gate the contractor was obliged to and did excavate 902 additional yards of earth through a quicksand formation at an actual cost to the contractor of \$2 per yard or an excess of \$1.36 per yard above his contract price, amounting to the sum of \$1,226.72.

CONCLUSIONS OF LAW

1. The delay in the Engineering Department of the State in withholding the order changing the pile foundation of the guard-gate to concrete foundation coming within the brief period that remained before the contract was to be completed involved the contractor in an additional expense of procuring the necessary material and largely increased his cost of excavation. The changing of the foundation from piles to concrete, necessitating the excavation through a body of quicksand, largely increased his cost of excavation and the State is justly liable to compensate him therefor.

2. The contractor is entitled to recovery from the State in consequence thereof the sum of \$1,685.81, which sum is hereby awarded to him.

VI

CULVERT NO. 73½

FACTS.

1. By Alteration Order No. 4 bearing date January 29, 1913, a new culvert under the canal was ordered at about the center line of station 4290 minus 70, to be known as Culvert No. 73½. The object of this construction as stated in the alteration order was as follows: "A small stream enters the present canal at about station 4291. Owing to the fact that the new canal banks and water surface will be some 2 feet higher than the present water surface, the water will be backed up in this stream and a considerable area will be flooded. To avoid this it is proposed to build a new 36-inch cast iron culvert to carry this drainage under the canal."

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2. There was no hidden or concealed defect either in the formation of the soil or the drainage of the surface which prevented the engineers from including this culvert in the original plans at the time they were prepared.

3. The construction of this culvert required the contractors to excavate for a considerable distance through solid rock and by reason of the lateness of the order compelled him to procure his material for the culvert during the closed season of navigation in the winter resulting in an actual loss to the contractor in excess of the contract price for similar items under the contract.

4. The State has paid the contractor for this work at the rate of the contract price for similar items under the contract.

5. During the trial the parties stipulated that if the State is liable for anything the claimant should recover the amount of \$915.80 in addition to the item for pumping, bailing and draining.

CONCLUSIONS OF LAW

1. The change made by Alteration Order No. 4 was at so late a period and so near the time fixed for the termination of the contract that it was not within the meaning of paragraph 6 of the contract prohibiting the contractor from charging more than item prices for the work performed.

2. The contractor is entitled to recover from the State upon this claim the sum of \$915.80.

VII

COFFERDAM, PUMPING, BAILING AND DRAINING

FACTS

1. Under the provisions of the contract, the contractor was required to build a concrete trough over the ravine at Holley, 1,112 feet in length.

2. The contract price for coffer dam, pumping, bailing and draining was \$2,400 per mile.

3. Under the provisions of Alteration Order No. 1. the floor of the trough was required to be made about one foot thicker and

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the footing course of concrete under the walls was widened and extended downward about twelve inches and the length of the walls was extended 967 feet, making the total length of the wall 2,079 feet.

4. The thickening of the floor, the extending downward of the footing course of the walls and the extending of the length of the trough entailed an extra expense to the contractor in the item of pumping, bailing and draining.

5. The parties have stipulated that "The contractor is entitled to recover of the State of New York for additional bailing, draining, etc., \$6,154.60.

6. Attached to Alteration Order No. 4 is a supplemental agreement in which the contractor agrees to do all the extra bailing and draining necessary under the new items entered therein for the sum of \$250. That among the new items entered therein was 15,200 cubic yards of rubble masonry and culvert No. 73½.

7. The original contract, Exhibit 38, and the alteration orders made thereunder are filed herewith and made a part of these findings.

8. No evidence was given showing that the contractor necessarily incurred any additional expense for extra bailing and draining under Alteration Orders than those above mentioned, except that of the Lattin's Guard gate and the Hindsburg bridge, for which in each case full compensation for all expenses incurred has been allowed herein.

9. No evidence has been given showing the amount of extra pumping, bailing and draining that has been done by the contractor or the expense incurred therefor or the value thereof.

CONCLUSIONS OF LAW

1. The claimant herein is entitled to recover from the State of New York for extra expense incurred in additional pumping, bailing and draining the sum of \$6,154.60.

2. The claimant herein is not entitled to any sum for extra pumping, bailing and draining other than above mentioned.

VIII

PREMIUM UPON BOND AND OVERHEAD EXPENSES

FACTS

1. The contract by its terms was to be completed on or before the 1st day of May, 1913, and contained the clause that "Time is the essence of this contract and in case the contractor fails to complete the work on or before that date he shall pay a penalty of \$70 a day for each day thereafter until the work shall be fully completed."

2. After the contractor had commenced work upon the contract, alteration orders were from time to time made, known as No. 1, 2, 3, 4, 5, 6 and 7, each providing for additional work amounting in the aggregate to about \$500,000. In the performance of the work under these alteration orders it necessarily continued the time upon which the contractor could perform under the contract until the 24th day of February, or practically ten months after the time specified in the contract for the completion of the same.

3. The continuance of the contract under the above-mentioned alteration orders for the period of ten months necessitated the renewal by the contractor of the bond required to be given by him, for which he was compelled to pay the sum of \$6,994. He also during that time maintained his overhead expenses amounting as he claims to the sum of \$12,700.

4. The contractor has been paid at contract prices for all of the work, labor and services performed and materials furnished, required by such alteration orders, at the item prices fixed by the contract, and in some instances has been allowed additional sums therefor.

5. The claimant herein has filed an additional claim which pertains to that part of the contract that was sub-let by the claimant to the Gabriel Brothers Construction Company, upon which it is claimed that there were stop orders issued on behalf of the State, which entitled the claimant to damages by reason of

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bond payments and overhead expenses. That claim is now in process of trial and the questions thereunder should be reserved until the determination of that case.

CONCLUSION OF LAW

The contractor in making his bid for the purpose of obtaining the contract is deemed to have made it sufficiently large to reimburse himself for the amount he has to pay in procuring the bond required by the statute and to support his overhead charges and in view of the fact that the contractor has been paid at contract prices for all of the work performed and materials furnished under the alteration orders, necessarily continuing the contract beyond the time fixed for its performance, he is deemed to have reimbursed himself for such bond and overhead expenses out of the profits received from the State by reason of his performance of the contract under alteration orders referred to. It follows that the claim of the contractor under this item should be disallowed, except as to the claim pending in the other proceeding in which the Gabriel Brothers Construction Company were sub-contractors, which is reserved for determination in that proceeding.

IX

MAINTAINING NAVIGATION

FACTS

1. Under the provisions of the contract a lump sum of \$16,800 was agreed upon for maintaining navigation in the canal. It was further agreed that "the contractor shall immediately after the execution of this contract begin the necessary preparations to do the work and promises and agrees that the work shall be completed on or before the first day of May, 1913."

2. The contract was executed on the 11th day of August, 1910, but owing to alteration orders requiring additional work on the part of the contractor, the work under the contract was through no fault of the contractor not completed until the 24th day of February, 1914.

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3. The contractor was required to and did do a substantial amount of work in maintaining navigation in the canal during the period intervening between the first day of May, 1913 and the 24th day of February, 1914.

4. The period between the execution of the contract and that fixed for its completion was $32\frac{1}{2}$ months and the period that elapsed thereafter before the contract was completed was ten months. The proportion due the contractor is $\$16,800 \div 32\frac{1}{2} \times 10 = \$5,169.20$.

CONCLUSION OF LAW

The contractor is entitled to recover from the State for maintaining navigation in the canal from May 1, 1913 to February 24, 1914, the sum of \$5,169.20.

X

MAINTAINING HIGHWAY TRAFFIC

FACTS

1. Under the provisions of the contract a lump sum of \$8,400 was agreed upon for maintaining highway traffic. It was further agreed that "the contractor shall immediately after the execution of this contract begin the necessary preparations to do the work and promises and agrees that the work shall be completed on or before the first day of May, 1913."

2. The contract was executed on the 11th day of August, 1910; but owing to alteration orders requiring additional work on the part of the contractor, the work thereunder was through no fault of the contractor not completed until the 24th day of February, 1914.

3. The contractor was required to and did do a substantial amount of work in maintaining highway traffic over the canal during the period intervening between the first day of May, 1913, and the 24th day of February, 1914.

4. The period between the execution of the contract and that fixed for its completion was $32\frac{1}{2}$ months and the period that elapsed before completion was 10 months. The proportion due the contractor therefore, is $\$8,400 \div 32\frac{1}{2} \times 10 = \$2,584.60$.

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CONCLUSION OF LAW

The contractor is entitled to recover from the State for maintaining highway traffic over the canal from May 1, 1913, to February 24, 1914, the sum of \$2,584.60.

XI

STONE CRUSHER

FACTS

There was a stone crusher standing near the canal at Albion. The State through its officers directed the contractor to remove it. The contractor performed the work and the parties upon the trial stipulated that the contractor be awarded the sum of \$315.30 for the expenses of such removal.

CONCLUSION OF LAW

The contractor is entitled to recover from the State the sum of \$315.30 for the removal of the stone crusher.

XII

INTEREST

FACTS

1. Under the provisions of the contract the engineer in charge was required to make monthly estimates of the work performed by the contractor and the State was required to pay him therefor, retaining 10 per cent thereof until the completion of the contract. Pursuant to this provision, estimates were made and the money paid to the contractor monthly thereon until the work was substantially completed and qualifiedly accepted. On the acceptance of the work performed under the contract on the 24th day of February, 1914, the State paid to him 90 per cent of the 10 per cent, the amount of the retained difference of monthly estimates, leaving 10 per cent still in the hands of the State to insure the performance on the part of the contractor of certain uncompleted items.

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2. On the first day of June, 1913, the date at which the original contract was to be completed under its provisions quite a sum of money had accumulated in the hands of the State but at that time a large portion of the work required under the original contract still remained unperformed.

3. After the qualified acceptance of the contract on the 24th day of February, 1914, numerous questions became the subject of negotiation between the claimant and the engineers some of which continued until after the commencement of the trial of this claim, but finally the engineers filed their final estimate on July 14, 1915, upon which there was paid over to the claimant the retained percentage that had been left in the hands of the State together with the amounts found due and owing to the contractor, amounting in the aggregate to \$2,831,933.66.

4. The claim herein is for interest accruing on the 10 per cent retained by the State out of the monthly estimates for the 10 months intervening between the first of June, 1913, the time specified for the completion of the contract and the 24th day of February, 1914, the date upon which performance under the contract was accepted; also for interest accruing upon the balance in the hands of the State on the 24th of February, 1914, and the 14th of July, the date of filing the final estimate.

CONCLUSIONS OF LAW

1. The contract not having been completed on the 1st day of May, 1913, the amount in the hands of the State retained from the monthly estimates was not liquidated and that consequently the contractor was not entitled to interest thereon.

2. That while the engineers failed to file their final estimate until the 14th of July, 1915, which under some circumstances might be deemed to be an unreasonable delay, but in view of the circumstances surrounding this case and the negotiations that had in the meantime been pending between the claimant and the engineers, I am not justified in holding that the delay was unreasonable, and therefore, interest should not be awarded.

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SUMMARY

No.	Claim	Award
1	Statute of Limitations.....	
2	Holley Trough and Extra Costs of Construction	\$5,189 10
3	Rubble Masonry	19,927 55
4	Hindsburg Bridge	2,284 95
5	Lattin's Guard Gate.....	1,685 81
6	Culvert No. 73½.....	915 80
7	Cofferdam, Pumping, Bailing and Draining..	6,154 60
8	Premium upon Bond and Overhead Expenses	
9	Maintaining Navigation	5,169 20
10	Maintaining Highway Traffic.....	2,584 60
11	Stone Crusher	315 30
12	Interest	
Total award		<u>\$44,226 91</u>

Let judgment be entered accordingly.

The opinion attached hereto may be deemed a part of this report.

All of which is respectfully submitted.

Dated April 5, 1916.

ALBERT HAIGHT,
Referee.

REFEREE'S OPINION

HAIGHT, Referee.—On the 11th day of August, 1910, the claimant, I. M. Ludington Sons, Inc., of Rochester, N. Y., entered into an agreement with the State of New York known as contract No. 62, pursuant to chapter 147 of the Laws of 1903, and the acts amendatory thereof, to improve the Erie canal from the west line of Monroe county to the east end of contract No. 9 at Eagle Harbor, a length of fourteen and fifteen one-hundredths miles, based upon estimates of quantities and information for

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proposals and specifications and preliminary estimates of quantities and costs embraced in sheets 1 to 140, inclusive, made by the State, and the bid or itemized proposal made by the claimant.

Upon the execution of the contract the claimant undertook its performance and substantially completed the same on the 24th of February, 1914, at which time it was conditionally accepted by the State and subsequently, and on July 14, 1915, a final estimate was made by the State Engineer upon which final payment was made to the claimant, amounting in the aggregate to the sum of \$2,831,933.66.

On the 6th day of May, 1914, the claimant filed with the Board of Claims, the jurisdiction of which is now vested in the Court of Claims, a notice of claim upon various items which will be hereafter separately considered, for work and labor performed and materials supplied not embraced in the final estimate, amounting to \$171,907.37, and again on the 20th day of May, 1915, at the commencement of the trial of this case before the referee the claimant filed an amendment to the claim by adding thereto several different items which the referee permitted to be done, directing that the same be filed with the Court of Claims.

The first question raised which becomes necessary to consider is the contention on the part of the State that the Statute of Limitations has run against the claim and therefore no recovery can be had thereon. I do not deem it necessary to enter upon a discussion of this question for I deem myself bound by the decision that was made by the Board of Claims in the case of Lake Erie Dredging Company v. State, 2 State Dept. Rept. (Off.) 442, in which it was held that the statute does not commence to run until the final estimate is made and filed. I am advised that that case is pending on review in our appellate courts, but until it is reversed or modified I must regard it as a reasonable and proper interpretation of the statute. Applying the rule therein established to the facts in this case, the claim, as originally filed, and the amendments that were filed upon the first day of the trial herein are within the period of time allowed by the Statute of Limitations, and the claim must therefore be considered upon the merits.

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Under the provisions of the contract the contractor undertook to complete the work under the contract on or before the 1st day of May, 1913, and it was mutually agreed that "the State reserves the right until the final completion and acceptance of the work to make such additions to or deductions from such work or changes in the plans and specifications covering the work as may be necessary, and the contract shall not be invalidated thereby; and the contractor shall do and complete the work in accordance with such additions to or deductions from the changes in the plans and specifications and no claim shall be made by the contractor for any loss of profits because of such change or by reason of any variation between the quantities of the approximate estimate and the quantities of the work to be done; and that the amount of payments for such work shall be based upon item prices specified in this contract, if there be such; but if such additions, deductions or changes shall require the furnishing of items of labor or material or both other than those for which prices are fixed, the contractor shall nevertheless perform the work and furnish the materials when properly ordered so to do and the compensation therefor shall be determined by contract prices of similar items, if there be any such so far as may be, and if there be no item prices of similar nature then compensation shall be fixed upon mutual agreement based upon the market prices so far as such prices may be made applicable thereto." Contract, § 6.

The plans and specifications call for the construction of a trough composed of second-class concrete over the ravines at Holley and Eagle Harbor of approximately 1,000 feet in length with walls about 20 feet high and 10½ feet thick in the vicinity of 100 feet apart with a floor between consisting of a layer of concrete upon which was to be placed a layer of waterproofing upon which there was to be placed another layer of concrete. The troughs were to be constructed upon the line of the old canal crossing these ravines upon embankments that were made in the constructing of the original canal. After the work had been commenced on the Holley trough and a portion of the concrete wall upon the south side had been put in place, a stop order was made

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by the resident engineer and thereafter and on the 15th day of November, 1911, an alteration order was made and served upon the claimant in which it was directed that the base of the walls should be lowered six inches and the concrete floors made so that the lower layer of concrete should be twelve inches thick and the waterproofing on top one-half inch thick, upon which there should be placed a layer of sand six inches thick, and upon the top of that a layer of concrete four inches thick. It was further provided in the plans and specifications that deformed metal bars three-quarters inch square and ten feet three inches in length be imbedded in the lower concrete base or footing course of the walls for a distance of seven feet, then bent upwards so as to be imbedded for the remaining three feet in the lower concrete layer of the floor. The base of the walls was widened so as to extend under the edge of the floor, forming a shoulder upon which the floor could rest at the point of its contact with the wall. These metal bars were spaced one foot apart extending throughout the length of the trough upon either side thereof and the length of the trough was increased approximately another thousand feet. Upon the new plans prepared by the engineers the added concrete was classified as second-class. The claimant protested against such classification, insisting that it was reinforced concrete, and that under the contract he was entitled to be paid at the price fixed for reinforced concrete, to wit, twelve dollars per cubic yard in place of seven dollars and fifty cents, the price of second-class concrete.

Upon this question the parties have now stipulated that the additional expense to the contractor caused by this change was the sum of three dollars and fifty cents per cubic yard for 1,482.6 cubic yards, amounting to the sum of \$5,189.10.

It is contended on behalf of the State that a supplemental contract was entered into between the State and the claimant in which the claimant has recognized the 'right' of the State to classify the additional concrete provided for in the alteration order as second-class concrete. The material portion of the contract is as follows: "That the prices to be paid by the party of the second part and received by the party of the first part as full

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compensation for the work done and the materials used in or by reason of new items appearing in the alteration order entitled 'Barge Canal Contract No. 62, Alteration Order No. 1,' shall be as follows, Id. Sand filling, cubic yards, Unit price, \$2.50."

It will be recalled that the alteration order provided for a sand cushion of six inches in depth to be placed over the tar felt or waterproofing course in the floor. The prices fixed in the contract covered many items involving concrete, iron castings, metal reinforcement, etc., but does not fix the price of sand. The sand cushion was not embraced in the original plan but was new under the alteration order. Its value or cost was not determined by the contract and so it was so disposed of in the supplemental agreement fixing it at two dollars and fifty cents per cubic yard. I am unable to construe this contract as having other force or effect. It in no case pretends to impair the provisions of the contract to the effect that "the amount of payment for such work shall be based upon item prices specified in this contract if there be such."

The next claim presented for consideration pertains to rubble masonry. Under the provisions of the contract, 5,125 cubic yards of rubble masonry was provided for at the contract bid of four dollars per cubic yard. By alteration orders 2, 4 and 6, the quantity of rubble masonry required was increased by the amount of 20,509 cubic yards which added to the yardage provided for in the original specifications, 5,125 cubic yards, makes a total of 25,634, or 25,821.3 cubic yards as allowed in the final estimate, or five times the amount originally called for. The claimant contends that the price bid was so low that it did not pay the cost of constructing the rubble masonry wall; that its real cost was two dollars per cubic yard in excess of that paid and that the orders under the contract, increasing the amount of cubic yards, was unreasonable and that he should be allowed the market value for that which was in excess of what the State could reasonably order under the provisions of the contract. Upon that branch of the case the parties stipulated as follows:

"*It is stipulated* that if the Referee should determine that the claimant is entitled to recover under item No. 2 of the claim for

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the portion of said item relating to Rubble Masonry, exclusive of extra excavation, bailing and draining, the amount to which the claimant is entitled under said item is \$19,927.55. It is stipulated that a fair and reasonable method of computing the amount of such liability (if found by the referee) is as follows: Take the amount of yardage called for by the original contract and plans, viz: 5,125 cubic yards, add 15 per cent of that amount, or 768.75 cubic yards, as a reasonable addition to such additional yardage which the State would have the right to require the contractor to perform at the contract price, making a total of 5,893.75 cubic yards for which the contractor has been fully compensated by the payment of the contract price at \$4.00 per cubic yard. Deduct this amount from the total yardage of Rubble Masonry as fixed in the Final Estimate, viz: 25,821.3 cubic yards and allow the contractor compensation for the remainder, or 19,927.55 cubic yards at the rate of \$5.00 per cubic yard, same being the reasonable market value of such excess quantities. The contractor having already been paid at the rate of \$4.00 per cubic yard for the total yardage, the amount due the contractor, if liability is found to exist is as stated above, viz: \$19,927.55."

The State now contends that notwithstanding the stipulation the amount of recovery that should be awarded upon this claim is for 5,880.85 cubic yards of rubble masonry at one dollar per yard instead of the amount specified in the stipulation. This latter amount was added by alteration orders No. 2 and No. 6; the contention being that the amount of rubble masonry added to alteration order No. 4 must be paid for under the provisions of the contract at four dollars per cubic yard instead of five dollars for the reason that attached thereto is a supplemental contract executed by the parties, the effect of which it is claimed is a waiver on the part of the contractor of any additional compensation for the material furnished and work performed under that order. The supplemental agreement bears date the 8th day of April, 1913, and, omitting the formal portions, provides as follows: "That the prices to be paid by the party of the second part and received by the party of the first part as full compensation for the work done and materials used in or by reason of *new items*

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appearing in the alteration order * * * shall be as follows: Id. Additional pumping, bailing and draining, alteration order No. 4, lump sum \$250." The question thus arises as to what is meant by the phrase "new items appearing in alteration order." This question appears to me to have been answered by the order itself, for after stating the objects of the alterations specifying rubble masonry, and various other changes and additions that were proposed to be made, concludes with a schedule giving the items of each material required and then concludes with the headline "New item added by this alteration," and underneath thereof the further words "Id. Additional pumping, bailing and draining, alteration order No. 4, Lump sum, 1." In the notice given to the contractor of the making of the foregoing alteration order, the schedule referred to in the original order is repeated, concluding with the same words, with reference to the "new item added by this alteration." And then follows in the concluding part of the notice the words "Id. Additional pumping, bailing and draining, alteration No. 4, lump sum \$250." Under the contract the amount agreed upon for the coffer dams, pumping, bailing and draining was a lump sum of \$2,400 per mile. There consequently was no fixed sum specified in the contract for alteration order requiring additional bailing and draining, and therefore the supplemental agreement was entered into for the purpose of disposing of that question so far as the work specified in that order is concerned. I am unable to find any clause in the contract, even liberally construed, that in my judgment would justify a finding that the contractor by entering into that contract waived his rights to be compensated for the extra work performed under the contract at the price fixed by the stipulation.

Under the provisions of the contract the claimant was required to construct a steel bridge across the canal known as bridge No. 121 at Hindsburg. Arrangements had been made on behalf of the claimant with the Lackawanna Bridge Company to furnish the material, fabricate the bridge and install it during the closed season of navigation of 1911-12 and have it completed before the opening of navigation in May, 1912. It appears that Mr. Worden, the president of the steel company, had caused to be

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prepared working plans from the original specifications furnished by the State on or before December, 1911, which he understood were forwarded to the chief bridge designer of the engineering department for approval. He, however, was unable to furnish any record of the forwarding of such plans or of any letter acknowledging the receipt thereof, and no record of their arrival or receipt by the department was found, although a book was kept for entering of record of all plans received. However, the bridge company having heard that the department had changed the plans in other bridges, the president of the company in February wrote the department with reference thereto and by letter dated the 28th of February, 1912, he received an answer changing the plans of the bridge in a number of particulars, increasing the weight and size of the channels and chords used, widening the bridge and providing a rail for footbridge for pedestrians. Within a reasonable time thereafter the bridge company caused the plans that had been drawn to be changed or redrafted and forwarded the same to the department for approval. They were received at the department and some further suggestions were made with reference thereto and a number of letters passed between the parties in which it was finally discovered that a mistake had been made on behalf of the department in one alteration that had been made in the bridge which operated to change the center of gravity. Thereupon the State dispensed with the alteration which had been required to be made which affected the center of gravity and then the plans were approved and returned to the bridge company but too late to give it time to fabricate the bridge and install it before the opening of navigation. The contractor having removed the old bridge and constructed the abutments in the early part of the year, it became necessary for him, in order to maintain highway traffic across the canal, to construct approaches upon either bank to a canal boat which was installed for use in place of the bridge, covering it with plank for a driveway, and then by means of horses, upon the approach of a canal boat, draw one end of it around so as to let the boat pass through and then return it to its position crossing the canal. This improvised bridge across the canal had to be maintained night and day

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during the open season of navigation, at considerable expense, which, with the expense of the bridge company in redrafting the plans in order to comply with the changes ordered, forms the basis of the claim for damages sought to be recovered by the claimant in this particular. The State had provided in the contract for a lump sum for highway traffic but this did not permit the State by its own fault or negligence to increase the burden of the contractor in maintaining highway traffic. There was some controversy as to the cost of redrafting the plans but in view of the time that was consumed and the letters written with reference to alterations and the revoking of them in part, the claim is not exorbitant. I have come to the conclusion that the alteration order embraced in the letter of February 28, 1912, prevented the contractor from fabricating and installing the bridge before the opening of navigation in the canal on May 15, 1912, and that I should allow the amount claimed by the contractor, which is for maintaining highway traffic, including 15 per cent profit, \$2,017.11; for the cost in the change of plans, \$267.84, making a total of \$2,284.95.

Under the provisions of the contract a guard gate was to be constructed near Lattin's bridge which under the specifications called for the construction of the concrete foundation upon piles. However, upon excavating for the construction of the north abutment of the gate it was discovered that three or four feet below the surface of the earth a hard material was found called "red horse." This material was of such a character that piles could not well be driven through it and consequently it was stated by the engineer in charge that the driving of piles under the provisions of the contract would have to be dispensed with. Under such circumstances the contractor proceeded to construct the concrete foundation of the north abutment upon the red horse. Subsequently the resident engineer informed the contractor that the driving of piles could be dispensed with in the construction of the southern and center abutments of the gate. The division engineer, however, upon being advised of the directions given by the resident engineer, informed him that he had exceeded his authority in dispensing with an important provision of the specifications,

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and the contractor was subsequently advised of such decision of the superior officer: In January, 1913, the matter was again taken up by the department in Albany and after a consideration of the circumstances of the case, alteration order No. 6 was issued, dispensing with the driving of piles for the foundation of the guard gate and substituting concrete instead to be placed upon the rock foundation. During the summer of 1912 the contractor had provided materials for the building of the south abutment of the gate but had neglected to provide any piles for the foundation and had failed to bring in sufficient gravel and sand for the concrete; the State having delayed the issuing of the alteration order dispensing with the piles until after the close of navigation of the year 1912 and until the winter of 1913, the contractor, in order to complete the construction of the gate before the opening of navigation in the spring of 1913, was compelled to cart in gravel and sand and other materials necessary, by means of teams from Eagle Harbor and vicinity, at considerable expense, and in excavating for the foundation of the southern abutment he had to go seven or eight feet deeper through a bed of quicksand or soft material in order to reach the rock upon which to lay the concrete foundation. Ordinarily, the contract prices would control in determining the amount that should be awarded for the extra concrete used in constructing the gate, but under the circumstances, owing to the delay of the State until a few months before the contract was to terminate in determining to dispense with the piles, I am of the opinion that the extra expense caused by such delay may properly be allowed as damages therefor, viz.:

For extra cost of hauling material.....	\$459 09
For 902 yards of extra excavation at \$1.36.....	1,226 72
	<hr/>
Total	\$1,685 81
	<hr/> <hr/>

By alteration order No. 4, bearing date January 29, 1913, an additional culvert, known as No. 73½, was directed to be constructed under the prism of the canal. It is stipulated by the parties that if the State is liable for anything the claimant

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should recover the amount of \$915.80, in addition to the item of pumping, bailing and draining. It is contended on behalf of the State that twenty-two culverts had been provided for by the contract and specifications, and that all of the items called for in the construction of culverts were upon the prices fixed by the contract and that consequently all of the work, labor and materials performed and provided in the construction of the culvert were upon contract prices and were fully paid for in the final estimate. This ordinarily would be true, but upon referring to the alteration order we find that the State had delayed making the same until the date therein specified; that the contract was nearing completion and the culvert had to be installed before the opening of navigation in the following spring. It required the contractor, for a considerable distance, to drill through rock and some of the material therefor had to be provided during the closed season of navigation, including the cast iron pipe, at considerable expense; the amount of such additional expense having been determined by the parties by stipulation, I am of the opinion that the same may be properly allowed.

A claim is presented for expenses incurred for extra pumping, bailing and draining under the alteration orders made by the State subsequent to the execution of the contract.

The theory of the claimant appears to be that a lump sum of \$33,960 was provided by the contract for pumping, bailing and draining and that sum was intended to cover the expenses of draining foundation structures only and did not include or contemplate the expense of draining the prism of the canal for excavation. It further appears to be the theory of the claimant that the provisions of the contract above quoted (requiring additional labor performed or materials furnished, either or both to be paid for by item prices specified in the contract if there be such, or by similar items so far as may be), that the lump sum provided for in draining foundation structures only provides such similar price for draining of additional structures required by the alteration orders and that the cost of the extra pumping, bailing and draining can be ascertained by dividing the cost of the structures required by the alteration orders by the cost of the foundation

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structures required by the contract, thus giving the proportion that one bears to the other or the percentage which multiplied by the lump sum provided in the contract will give the amount that should be awarded for the additional bailing and draining in consequence of the structures made under the alteration orders, and I am requested to find the facts accordingly.

Able experts and distinguished engineers have given their testimony before me approving the plan of so computing the cost of the extra bailing and draining and have expressed their opinions to the effect that in many instances it approximately reaches a correct result. Even the engineers appearing on behalf of the State have approved of the same in a modified form. The very able counsel appearing on behalf of the claimants has submitted a brief in which he has demonstrated that under the contract it is contemplated that excavation of the prism of the canal may be done by dredging and in a number of other respects his logic is unanswerable.

Under the circumstances I have hesitated long in reaching a conclusion but in the end I have formed the opinion that I must withhold my assent to the theory alluded to. While it is true that the contract recognizes the right of a contractor to dredge, it must be borne in mind that the State through its officers prepared a form for contract that could be used in all cases in which contracts were made for constructing the Barge canal and applicable for all parts thereof, but each contract must be construed with reference to the situation surrounding its locality. If the contract was located upon the Mohawk river we should expect to see great steam dredges scooping up the earth or perhaps equally large steam pumps sucking up the sand and running it off onto the abutting land. But up at Holley the situation is different. There the long level between Lockport and the Genesee river is supplied by water turned into the prism of the canal at Lockport. It is turned on in May and is turned off in November as soon as the period of navigation closes. The use of steam dredges and sand suckers would hardly be deemed practical in that locality or within the contemplation of the parties to the contract. It may be that the drag line scraper could be used to some extent in excavat-

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ing the prism of the canal, but it would be difficult to excavate the whole prism by that means or be profitable to so operate it. The steam shovel, railroads with Koppel cars, and hand work, are the prevailing means of excavation resorted to in that locality and the work thereby requires that the prism be drained.

Again suppose the route of the canal extended through high ground and that the prism had to be excavated through the solid rock which could only be accomplished by boring and blasting and that springs encountered were so large that several steam pumps were required to work night and day to keep the prism from filling up, could it then be held that the lump sum provided for draining should be applied solely to foundation structures and not any part thereof used for the purpose of draining the prism? Hardly. The supposed case is not an extravagant one for I am aware of a similar situation almost in view of that at Holley. There are other reasons but I do not deem it profitable to prolong the discussion upon this point further for I am of the opinion that I must withhold my assent to the request to find that the lump sum provided for draining was intended for foundation structures only.

Again, the theory contended for makes no distinction as to the amount of draining necessary in the different localities that exist within the fourteen miles covered by the contract. It assumes that a structure built under an alteration order on an embankment fifty feet high upon earth filled in sixty years ago will require the same amount of draining as a structure of the same cost built under the original contract located in a valley upon natural ground surrounded with underground streams of water and springs. In natural earth underground water courses and springs are not uncommon, but in artificial embankment underground water courses and springs are seldom found. It is common knowledge that in one section of the country the land is dry and free from springs while in another section it is damp and filled with springs. The theory, therefore, that places all sections within fourteen miles on the same basis with reference to the amount of draining necessary would be liable to result in an erroneous result.

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It appears to me that there is another fundamental error in the contention of the claimant. The contract does not provide a lump sum for draining. Instead it provides a specified price of \$2,400 per mile. Referring to the itemized proposal sheet attached to the contract, we find it divided into four columns. The first column is marked "quantities." The second column "items." The third "price" and the fourth "amount."

Under the head of "quantities" appears fourteen and fifteen one-hundredth miles. Under the head of "items," coffer dams, pumping, bailing and draining per mile; under the column "price" appears \$2,400 and carried out in the column for "amounts" we find \$33,960. The next entry is that for clearing, per lump sum \$720, not entered in the price column but entered in the amount column; and so we find throughout the itemized proposal sheets items in which a lump sum is provided it is so stated and the amount of such lump sum is carried out in the column for amounts.

Such is the case with reference to maintaining of navigation, per lump sum, \$16,800, and for maintaining highway traffic, per lump sum, \$8,400. But in all cases where it is not based upon a lump sum, but is based upon miles, cubic yards, feet and pounds or other quantities, the item price is specified in the third column and that price multiplied by the quantity which is given in the first column gives the amount entered in the fourth column under the head "amounts." To illustrate further, the third item of the proposed sheet under head "quantity" is 1,625,600. Under "item" is cubic yards excavation per cubic yard. In the price column is entered sixty-four cents; and then carried out in the amount column is \$1,040,384. If the \$33,960 appearing in the amount column is to be deemed a lump sum for coffer dams, pumping, bailing and draining, notwithstanding the item price of \$2,400 per mile, then it must also follow that the \$1,040,384 appearing in the third item is a lump sum for the excavating of the 1,625,600 cubic yards of earth and so it will be throughout the entire list, every amount carried out in the fourth column may be considered a lump sum notwithstanding the prices fixed in the preceding column. If, therefore, I am correct in my conclusion

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that under the contract the \$33,960 is not deemed to be a lump sum and the figure given in the price column is deemed to be the item price referred to in the contract above quoted, it would necessarily follow that the proportion contended for by the claimant must be limited to miles and not to total foundation structures. The construction of the Holley trough as provided for in the original plans was 1,112 feet in length. Under the alteration order No. 1 the trough was extended 967 feet. The same alteration order provided for a sub-base and the insertion of metal bars in the walls of the trough that had been provided for in the original contract that had not then been completed. It thus extended the trough to 2,079 feet, practically two-fifths of a mile. Assuming that the amount of draining by a structure provided for by the alteration order would be the same as such a structure provided for in the original contract, then the extra draining by reason of the structure would be practically two-fifths of a mile, or two-fifths of the \$2,400 specified as the item price for draining, per mile, which would amount to \$960. But that plan, it will readily be seen, is open to the same criticism that is made with reference to claimant's plan. It assumes that the extra draining necessary will equal the draining provided for under the original contract. In other words, that the structure doubles the amount of the draining. This I regard as fatal to the adoption of the plan, thereby leaving the determination of the cost of extra pumping, bailing and draining to be determined under the provisions of the contract by the agreement of the parties or if they are unable to agree, to the determination of the courts under the rule of *quantum meruit*, possibly adding thereto by way of profit the usual percentage. This rule is just and equitable to both parties, and as I understand, has been adopted by the Court of Claims. See *McGovern Co. v. State*.* Unfortunately, I am unable to apply it in this case for the reason that I have no evidence before me bearing upon the question of amounts of extra pumping, bailing and draining, or the cost thereof.

The parties, however, have stipulated that the contractor is entitled to recover for additional bailing and draining the sum

* See Judge Rodenbeck's opinion in this volume at page 37.

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of \$6,154.60. That stipulation I gladly follow, believing that it is just and that it substantially relieves the contractor from a loss that he may have sustained by reason of his failure to keep an account of the extra bailing and draining he was obliged to perform in order to complete his contract.

The next claim to which my attention is called pertains to the right of the claimant to be awarded damages for the amount that he has been compelled to pay for premium upon bonds and his overhead expenses, during the period intervening between the time when under the provisions of the original contract the work was to be completed, namely, the 1st day of May, 1913, and the 24th of February, 1914, the day on which the contract was completed and accepted by the State. Ordinarily, the contractor in making his bid for the purpose of obtaining a contract is deemed to have made his bid sufficiently large to reimburse himself for the amounts that he has to pay in procuring the bond required by the statute and to support his overhead charges. It is only in cases where the State has unreasonably delayed him in the performance of his work under the contract, without fault on his part, that damages for such items, in the nature of a breach of contract, will be awarded. If alteration orders had been issued on behalf of the State through its constituted agents and officers which increased the work performed under the contract and payable at the contract prices, the time for the completion of the contract will thereby be deemed to be extended for such reasonable time as may be necessary in order to enable the contractor to complete the same.

In this case it is claimed that the agents of the State did unnecessarily and unreasonably interfere with the work of the contractor and did delay him in the construction of the Holley trough and this claimant has filed an additional claim based upon such delays and the subject-matter therein involved has been referred to me, and the same is now in process of trial. This claim pertains to that portion of the canal in which the contract for its improvement was sublet by the claimant to the Gabriel Bros. Construction Company and the delay complained of occurred during the time that that company was endeavoring to perform the work required by the contract.

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During the progress of the trial of the claim that I now have under consideration, the attorneys for the claimant herein stated that the only claim it made for delay was of its subcontractor, the Gabriel Brothers Company. I consequently understood from this statement that it was not intended to press any claim upon delay in so far as that portion of the contract which had been sublet to the Gabriel Company was concerned, until the final submission of that case, and the receipt of the claimant's proof therein. While I propose to examine all of the claims presented with reference to delays that occurred in other contracts upon other portions of the canal covered by the original contract of the claimant, I shall reserve for my final determination in the other proceeding all of the questions and rights of parties that accrue out of delays upon the Gabriel Brothers Co. contract.

With reference to the Hindsburg bridge claim, there were delays occurred by which the installing of the bridge was postponed over one open season of the canal. That claim I have already considered herein and have awarded the claimant all of the damages that he sought to recover therein, together with 15 per cent profit upon the work, thus leaving no further claim open upon which an award can be made by reason of that work.

I have also considered the claim made with reference to dispensing with the piles in the Lattin's guard gate and substituting concrete for the base, and have awarded extra compensation above the contract price for that change in the contract, thus fully compensating the claimant for all damages that were suffered by reason of the alteration made with reference to that part of the contract.

I have also considered the claim arising out of the construction of an additional culvert known as No. 73 $\frac{1}{2}$ and under the stipulation of the parties agreeing upon the amount that should be recovered "in addition to the item of bailing and draining" and I have awarded as damages the sum agreed upon, which necessarily includes all other items of claims for damages by reason of that work except that of pumping, bailing and draining.

With reference to the claim for damages accruing out of the alteration orders requiring additional amounts of rubble masonry, the parties had agreed as to the amount of damages that should

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be awarded if I should determine that the State was liable upon such claim. Some time afterward the attorneys differed as to their understanding of the agreement, one claiming that the amount stipulated included a claim for overhead charges or premium paid upon bonds and the other that it did not. Neither party, however, asked to be released from the stipulation or agreement and it was therefore left to me to determine what the respective parties meant by their own stipulation. I am therefore called upon to discharge an unpleasant duty. The provisions of the stipulation so far as I deem material to be now considered are as follows: "It is stipulated that if the referee should determine that the claimant is entitled to recover under item No. 2 of the claim for the portion of said item relating to rubble masonry *exclusive of extra excavation, bailing and draining*, the amount to which the claimant is entitled under such item is \$19,927.55." It will be observed that the question reserved by the State is that, "If the referee should determine that the claimant is entitled to recover," etc., and on behalf of the claimant it will be observed that the question reserved is "*that of extra excavation, bailing and draining.*" Thus we have one exception on behalf of the State, another on behalf of the claimant, the first pertaining to the question of liability to recover anything; the second to that which is excepted. In view of the fact that bond premiums and overhead expenses were not included in the exception, the inference to my mind is that every item of damages was included in the amount agreed upon, except *extra excavation, bailing and draining*. It is upon that construction of the stipulation that I have made my award for damages upon that branch of the case, and it consequently follows that no further sum can be allowed.

It furthers appears that there was a number of items of work required to be performed under the specifications and provisions of the contract outside of that which pertained to the subcontract with the Gabriel Company which had not been completed at the time specified in the original contract, May 1, 1913, and indeed some of them were not completed until the termination of the contract on the 24th of February, 1914, the time the work was accepted by the State.

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But these items related to requirements of the contract and specifications or by alteration orders made with reference to improvements which have been settled and disposed of, either by negotiations between the parties or allowed by the final estimate of the engineers and have not been the subject of investigation under the claim now before me. Consequently I have not the data at hand from which I can determine whether the delay in completing the work as to such items was the fault of the contractor or the State. Possibly where such work was required to be performed under an alteration order made after the 1st day of May, 1913, I might assume that the delay was attributable to such order; but I have no facts before me by which I can determine whether or not such delay was taken into consideration by the engineers in making their final estimate, or as to whether compensation was awarded to the contractor therefor. The fact remains, however, that the claim arising out of such additional work has been settled and paid for and I do not deem that I have the right to disregard such settlement and now make an additional award thereon. It is true that the contractor in this case has been compelled to carry its overhead expense and pay an additional premium for the continuation of its bonds for the period of ten months between the 1st day of May, 1913, and the final completion and acceptance of the work. But Mr. Ludington in his testimony admitted that in making his bids for the contract he made them sufficiently high to afford a profit which would take care of the overhead expenses of the company and of the premium upon the bond during the period provided for in the original contract, but all of the alteration orders that were made by the State after the making of the contract required additional work, to be paid for at the contract prices, all of which has been allowed and in some instances an additional sum has been awarded. Such additional allowance exceeds that provided for in the original contract by the sum in round numbers of \$500,000. The alteration orders providing for additional work operated to extend the time specified in the contract for which the original work provided for was required to be performed for such reasonable time as was necessary in order that the contractor might complete

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the same. The profits arising from such additional work based upon the bid of the contractor must be deemed to have been the same as that made upon the original contract and consequently to have furnished a sufficient profit to take care of the overhead expenses and premium paid upon bond for the period of the ten months alluded to. I have therefore reached the conclusion that outside of the claim arising upon that part of the improvement of the canal which was sublet to the Gabriel Construction Company, no allowance should be made for overhead expenses or bond premium.

Under the provisions of the contract lump sums were agreed upon; for maintaining navigation, \$16,800, and for maintaining highway traffic, \$8,400. It was further provided, "the contractor shall immediately after the execution of this contract begin the necessary preparations to do the work and promises and agrees that the work shall be completed on or before the first day of May, 1913."

The work was not in fact completed until the 24th day of February, 1914. It is now claimed on behalf of the contractor that he should be awarded compensation for maintaining navigation and highway traffic for the intervening period between the 1st day of May, 1913, and the final close of the work about ten months thereafter. Some controversy arose with reference to the work that was done by the contractor in maintaining navigation and highway traffic during that period of time, but I am of the opinion I must find as a fact that there was substantial work done by the contractor both in maintaining navigation and highway traffic during that period.

I am also of the opinion that the alteration orders to which allusion has already been made required an additional time to complete the work thereunder and that such orders operated to extend the time of performance beyond the period originally fixed in the contract. The question, therefore, arises as to what compensation should be awarded. The bid of the contractor having been accepted by the State doubtless contemplated the completion of the work originally provided for and the termination of the contract on the 1st day of May, 1913. I think, therefore, it forms a proper basis for the determining of the compen-

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sation that should be awarded for the additional period of time required to complete the work under the alteration orders.

As we have seen, the contractor was required to commence immediately after the execution of the contract which was on the 11th day of August, 1910. Assuming that he entered upon the discharge of his duties immediately thereafter, giving him until the fifteenth of the month, the period of time left within which he was to complete the performance would be thirty-two and one-half months. Dividing the lump sum allowed for maintaining navigation, \$16,800, by thirty-two and one-half we find that \$516.92 would be the amount allowed for each month, and multiplying this result by ten, the number of months that it took to complete the contract in excess of that agreed upon, would leave a sum of \$5,169.20, which amount I have concluded to allow for maintaining navigation.

There is another basis of figuring the amount which I have considered and that is by taking the period provided for in the contract for the open season of navigation. From August fifteenth to November fifteenth, the time for closing, would be three months during the period of navigation for 1910. For 1911 the period is from the fifteenth of May to the fifteenth of November, six months, and the same for 1912, making fifteen months in all. Dividing the lump sum by fifteen months and then multiplying it by six, the number of months which navigation was open during the year 1913, would give a slightly different result, but in view of the fact that during the closed period the contractor was deemed to be in possession of the canal embraced in his contract and was prohibited from doing anything that would interfere with the opening of navigation the next season, I have concluded to make the computation upon the entire period of time intervening.

With reference to maintaining of traffic over the highways, I have adopted the same basis as dividing the lump sum, \$8,400, by thirty-two and one-half months, thus giving the sum of \$258.46 per month, which multiplied by the ten months intervening between the time the contract was to be completed and the time it was accepted would give \$2,584.60, which sum I have concluded to allow for highway traffic.

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Among the claims presented was one for the removal of the stone crusher at or near Albion at the direction of the State. With reference to this claim the parties upon hearing stipulated that the sum of \$315.30 may be awarded as expense for such removal and that sum is consequently allowed as an item of recovery herein.

Under the provisions of the contract the engineer in charge was required to make monthly estimates of the work performed by the contractor and the State was required to pay him therefor, retaining 10 per cent thereof until the completion of the contract. Pursuant to this provision estimates were made and the money paid to the contractor monthly, thereon, until the work was finally completed. It is now claimed on behalf of the contractor that the 10 per cent retained by the State upon each monthly payment became due and payable on the 1st day of June, 1913, and that therefore the company is entitled to interest on that sum up to the time of the final completion of the contract. It appears that quite a sum had accumulated in the hands of the State at that time. Work upon the contract and under the alteration orders had been performed upon which sums of money were paid amounting to nearly the sum required by the original contract. But it appears that a large portion of that required by the original contract still remained unperformed and consequently the 10 per cent retained by the State did not become a liquidated claim but was subject to depletion by the neglect of the contractor thereafter to perform the work required by the contract. It follows that at that time the contractor had no legal right to demand and receive the amount retained, consequently his legal right to interest thereon does not exist.

Upon the completion of the contract on the 24th of February, 1914, the contractor was paid 90 per cent of the amount that had accumulated in the hands of the State by reason of the provision authorizing the retention of 10 per cent of the amounts fixed by the monthly estimates, the State still retaining the remaining 10 per cent thereon, pending the receipt of the final estimates from the engineer. These final estimates were not completed until July 14, 1915, nearly a year and five months thereafter. The contractor now claims interest on the amount so retained by

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the State during that period of time. Witnesses speaking upon the subject have stated that a reasonable time for the engineers to make up the final estimate was from thirty to ninety days. Ordinarily I should not hesitate in holding that the engineers had taken an unreasonable length of time to get out their final estimate, but there are circumstances present in this case that cause me to hesitate. The work provided for by the contract extended over fourteen miles of the canal and was of a great variety and character, performed under the guidance of a number of sub-contractors, and numerous claims had arisen based upon stop orders and alteration orders and the change of material used, which raised many questions for the determination of the engineers. These questions were the subject of negotiations running through a number of months, finally resulting in the adjustment of quite a number of claims that were audited and allowed by the engineers, some after the commencement of the hearing herein. Ten per cent of the money so retained was not liquidated for it is apparent that the acceptance of the work done under the contract was conditional. There were still a number of items of work remaining to be performed by the contractor. It is true that some of them were of trifling amounts, such as putting in the counter weights of the Lattin's guard gate, the supplying of anchor bolts, etc., but there were others that involved considerable expense, such as the painting of a bridge, the placing of wash walls, the lining of the towpath, the railing of a bridge, the placing of slabs for its approach, etc. At the time the 90 per cent of the amounts retained under the contract from the monthly estimates was paid over, the remaining 10 per cent was retained evidently for the purpose of protecting the State against the failure of the contractor to fully perform. The case of *Sweeny v. The City of New York*, 173 N. Y. 414, has no application to the foregoing questions discussed with reference to interest for the reason that the percentage retained was under the express provisions of the contract and was not payable until the contract was fully performed.

I therefore am of the opinion that I cannot overrule the determination made by the engineers in their final estimate upon this question.

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As I understand the Court of Claims allows interest on claims of the character herein considered only from the date of entering judgment. A referee should follow the rule of the court and not attempt to overrule his superiors.

Upon the trial a number of questions were raised upon which rulings were made subject to review on the final submission of the case. The attorneys, however, presented no arguments or briefs upon such rulings.

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No. 2744-A

(Filed July 19, 1916)

Claim for Damages on State Highway Contract

The "information for bidders" in connection with a contract for the construction and improvement of a State highway, contained a provision that where the use of local sand and gravel is anticipated the proposal sheets will give the information as to the location of such material, and further provided that "when such information is not given in the proposals the contractor will be required to furnish approved imported material." The proposal sheets gave no information as to the location of material that could be used, and consequently the duty devolved upon the contractor to furnish "approved imported material."

Expert witnesses were of the opinion that the material was "local" material if it could be reached by the contractor's outfit that was maintained for the purpose of constructing the highway under the contract; and that it was "imported" material if it was such as could be brought in by a common carrier. The Referee, however, refused to adopt this construction, but limited "local" material "to that which is adjacent to the highway," and "imported" material to "material brought in from a place other than where it is to be used, by whatever means, public or private."

The specifications required that the ingredients of the concrete should be approved by the Bureau of Tests of the State Highway Department before being used on the work. As to one gravel pit, the division engineer took a sample, subjected it to a field test and gave the contractor written approval for its use, but neglected to forward the sample to the Bureau of Tests until after the contract was cancelled. It was then forwarded, however, and approved. As to the other pit, a sample had been forwarded to the Bureau of Tests for use in the construction of a nearby highway and the division engineer knew it had been approved at the time he gave the contractor herein his consent for its use. The Referee held that the failure of the

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division engineer to forward the sample of gravel taken from the first pit to the Bureau of Tests was the act of the official of the State for which the contractor was not responsible, and in view of the fact that the Bureau of Tests had subsequently approved the material it was apparent that the State had not been prejudiced by such failure.

The use of the gravel in these pits by the contractor was open and known to the State officials. The monthly estimates of the work performed under the contract made by the State's engineers were reported by them to the Commissioner of Highways, together with the final estimate made after the contract had been cancelled and the payments thereon were made by his authority. The Referee held that such report and payment amounted to an acceptance of the work done, both as to its character and materials used, and formed the basis upon which the question of profits could properly be determined.

The contract was cancelled by the State, but such cancellation was not due to any failure on the part of the claimant to perform the contract, nor to the sand and gravel used by it. At the time of the cancellation the claimant was willing and able to perform it within the time specified therein and duly protested against its cancellation. When the contract was executed the claimant purchased and installed an expensive plant for the speedy and economical construction of the highway. It claimed that the damages suffered by reason of the amount expended in such purchase and installation with the depreciation in value therein amounted to nearly \$20,000, which sum it sought to recover from the State. The claimant also sought to recover for the prospective profits it would have made had it been permitted to complete the contract. The Referee held that the measure of damages is the amount of the party's loss, and that this may consist of two classes, namely, actual outlay and anticipated profits. The first is the amount that he has been induced to spend on the faith of the contract in the performance thereof which may include a fair allowance for his own time and services. The second is for the anticipated profits he may have made had he been permitted to perform the contract, subject to the rules of law as to the character of the profits which may thus be claimed.

The cancellation of the contract by the State prohibited the actual performance of the work provided for under the contract and therefore the contractor was powerless to earn any pay thereunder or in any manner indemnify himself for the money expended in equipment. Therefore, such damages would be properly awarded hereunder were it not for the fact that the claimant has also sought to recover as damages the anticipated profits, the amount of which the Referee ascertained and awarded judgment therefor. The design of the award is to place the claimant in the identical situation it would have been in had the cancellation of the contract not taken place, and had it been permitted to proceed with the work and perform the contract in its entirety. It then would have been compelled to reimburse itself for the amount expended in the purchase and installment of the plant out of the profits, and would have to suffer the depreciation that resulted therefrom, accepting as full compensation therefor the amount of the summation of the products of the approximate quantities and of work performed based upon the unit contract prices.

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The claimant in making its bid is presumed to have taken into consideration the cost of labor, its overhead expenses, the amount of premium to be paid upon its bonds and the cost of installing its plant and to have made the same sufficiently large to reimburse itself therefor out of the profits. The profits having been determined and adjudged, all items of damage of the character of those above specified have merged therein.

The claimant also sought to recover the costs of transportation, etc., to Albany and return for the purpose of conferring with State officials. These conferences pertained chiefly to the negotiations looking toward the changing of the type of road and the question of the claimant taking a new contract therefor. The Referee held that these expenditures were not made in the performance of the contract and therefore disallowed them.

CLAIM against the State of New York for damages resulting in the action of representatives in canceling a State highway contract without default on the part of the claimant.

John F. Murtaugh, Herbert N. Babcock and subsequently Richard H. Thurston, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

REPORT BY HON. ALBERT HAIGHT, OFFICIAL REFEREE

To the Honorable, the Court of Claims of the State of New York:

An order of the Court of Claims of the State of New York having been entered upon a stipulation of the Attorney-General with the attorneys for the claimant herein, pursuant to chapter 229 of the Laws of 1911, by which order and stipulation the questions raised by the claim filed by the claimant with the Court of Claims was referred to me to hear, try and determine the same; I, the undersigned referee, do respectfully report:

On the 17th day of January, 1916, at my office, No. 307 Electric building, Buffalo, N. Y., that being the time and place fixed for the trial of the issue raised by the claim filed herein, there appeared as attorneys on behalf of the claimant, Hon. John F. Murtaugh, Elmira, N. Y., Herbert N. Babcock, Elmira, N. Y., and subsequently Richard H. Thurston of Elmira, N. Y. On behalf of the State there appeared as attorney, Hon. Egburt E. Woodbury, the Attorney-General, represented by Edmund H. Lewis, Deputy Attorney-General.

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Thereupon the oath of the referee prescribed by law was waived by stipulation of all the parties.

The trial then commenced and was continued upon divers subsequent days by adjournments and consent of the parties herein at my said office until the close of the evidence and the conclusion of the trial on the 2d day of June, 1916, at which time the attorneys for the parties submitted oral arguments and briefs with the privilege of thereafter submitting reply and supplemental briefs with the requests to find and the exhibits in the case, which reply and supplemental briefs together with the requests to find were finally received by me on the 28th day of June, 1916.

Now, after hearing John F. Murtaugh and Richard H. Thurston, attorneys for the claimant, and Edmund H. Lewis, Deputy Attorney-General for the State, and due deliberation having been had, I do find and decide as follows:

FINDINGS OF FACT

I

The claimant now is, and at all times hereinafter mentioned was, a foreign corporation, duly incorporated and in being under and by virtue of the laws of the State of Massachusetts and was duly authorized to carry on business in the State of New York; that the principal place of business of claimant in the State of New York was at the village of Horseheads in the county of Chemung in the said State.

II

On or about the 20th day of April, 1914, the State of New York, through its appointed and empowered Commissioner of Highways, advertised for proposals for the construction and improvement of a highway in the counties of Chemung and Schuylers, known and designated as "State Highway No. 5432" and also designated as "Horseheads-Cayuta Highway" extending from a point on county highway No. 356 through the hamlet of Sullivanville and through the hamlet of Cayuta, county of Schuylers, a distance of eight and ninety-eight one-hundredths miles.

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III

On or about the 11th day of May, 1914, the claimant made and filed with the Commissioner of Highways at his office in the city of Albany, N. Y., a proposal for the improvement of such highway. That such proposal was upon the forms prescribed by the Commissioner of Highways, was submitted in conformity to the requirements of said Commissioner and made a bid for the furnishing of the material and the performance of the work required in the construction of such highway, giving the item prices for the materials required and the work to be performed, amounting in the aggregate to the sum of \$124,781.50. That such proposal and bid was accompanied by a certified check for 5 per cent of the amount of the contract as required by the notice published by the Commissioner of highways, and on the said 11th day of May, 1914, the proposals of the different parties bidding upon such work were opened at the office of the Commissioner of Highways in the city of Albany and the bid of the claimant herein was found to be the lowest bid for the improvement of such highway and the contract for such improvement was thereupon awarded to the claimant.

That thereafter and on the 15th day of May, 1914, the claimant and the State Commissioner of Highways entered into a contract for the construction by the claimant of highway No. 5432 in accordance with the plans and specifications, which contract was approved by E. S. Harris, Deputy Comptroller, on the 21st day of May, 1914, countersigned by J. N. Carlisle, Commissioner of Highways, and approved on the 22d of July, 1914, by R. K. Fuller, secretary, a copy of which contract was then delivered to claimant who executed and delivered to the State the bond required therefor, a copy of which contract and bond is marked claimant's exhibit No. 1 and is herewith filed in connection with this report and made a part thereof.

IV

The plans and specifications for the construction of the highway 5432 were a part of the contract therefor and included within the specifications were the "notice to contractors," the "information for bidders" and the "itemized proposal." The notice to

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contractors was the advertisement for the proposals published pursuant to statute and contained the following statements:

“After Friday, April 24th, maps, plans, specifications and estimates may be seen and proposal forms obtained at the office of the Commission in Albany, N. Y., and also at the office of the Division Engineer Frederick Steele Strong, St. Ann. Federation Building, Hornell, N. Y.

“The special attention of bidders is called to ‘Information for Bidders’ in the Itemized Proposal, Specifications and Contract Agreement.”

The “information for bidders,” which was attached to the itemized proposal, specifications and contract agreement contained the following statements:

“The Information for Bidders, proposals, specifications and plans are to be considered as and shall form a part of the contract. * * *

“The attention of persons intending to make proposals is specifically called to that paragraph of the contract which debars a contractor from pleading misunderstanding or deception because of estimates of quantities, character, location or other conditions surrounding the same; also attention is called to the uncertainty in the quantities of many of the items involved in this contract. * * *

“Whenever the use of local sand, gravel, stone, iron ore, slag or tailings is anticipated the proposal sheets will give information as to the location of this material and the items under which such material may be used. When such information is not given in the proposal the contractor will be required to furnish approved imported materials.”

The “itemized proposal” was the bid or proposal submitted by the claimant as one of ten competitive bidders, signed “Peter F. Connolly Co. by Peter F. Connolly, Treas.” and contained the following statements:

“The undersigned also hereby declares that he has, or they have, carefully examined the plans, specifications, form of contract, and that he has, or they have, personally inspected the actual location of the work together with the local sources of supply, has, or have satisfied himself or themselves as to all the

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quantities and conditions and understands that in signing this proposal he, or they, waive all right to plead any misunderstanding regarding the same.

“The undersigned further understands and agrees that he is, or they are, to furnish and provide for the respective item price bid all the necessary material, machinery, implements, tools, labor, services, etc., and to do and perform all the work necessary under the aforesaid conditions to complete the improvement of the aforementioned highways in accordance with the plans and specifications for said improvement, which plans and specifications it is agreed are a part of this proposal, and to accept in full compensation therefor the amount of the summation of the products of the approximate quantities multiplied by the unit prices bid. This summation will hereafter be referred to as the gross sum bid.”

The “general specifications” contained the following statements:

“Whenever the words ‘Bureau of Tests’ are used they are understood to mean the New York State Commission of Highways Bureau of Tests at Albany, N. Y., or a laboratory specially designated by the Commission for testing the materials to be used under this contract.

“Work shown on the plans and not mentioned in the specifications or vice versa shall be done the same as if shown by both and in case of conflict the Commission will determine which will govern.

“All work to be done and materials to be furnished in accordance herewith shall be required to be performed or furnished in accordance with the best general practice of the State Commission of Highways of New York State and to be of the highest quality unless otherwise specifically stated hereinafter.”

The “detail specifications” contained the following statements:

“Concrete shall consist of approved Portland Cement, a fine aggregate of sand or screenings, and a coarse aggregate of broken stone or gravel, mixed in the proportions specified for the various classes given below. Samples of all these ingredients shall be submitted and approved by the Bureau of Tests and shall be acceptable to the engineer before being used in the work.

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"All fine aggregate shall be tested by the Bureau of Tests and shall be approved by the engineer before it shall be permitted in the work.

"Gravel for all classes of concrete shall be composed of hard durable insoluble stone tested by the Bureau of Tests and acceptable to the engineer. Gravel shall not be used unless permitted in writing by the engineer."

Under the specifications for cement concrete pavement was the following statement:

"Concrete shall consist of a mixture of Portland Cement, sand or screenings and broken stone or gravel. All these materials shall pass the tests required. * * *"

The contract agreement contained the following statements:

"The contractor further agrees that he is fully informed regarding all the conditions affecting the work to be done and materials to be furnished for the completion of this contract, and that his information was secured by personal investigation and research and not from the estimates of the State Commission of Highways and that he will make no claim against the State by reason of estimates, tests or representations of any officer or agent of the State.

"The said work shall be performed in accordance with the true intent and meaning of the plans and specifications therefor, which are hereby referred to and made a part of this contract, without any further expense of any nature whatsoever to the State than the consideration named in this contract.

"In case of any ambiguity in the plans, specifications or maps or between them, the matter must be immediately submitted to the Commission of Highways which shall adjust the same, and its decision in relation thereto shall be final and conclusive upon the parties."

Upon the plans was the notation or legend, "No local materials shall be accepted for second or third class concrete."

Upon said plans are also noted the following: "The gravel, filler and stone for item 40 shall be *local* materials from sources of supply located in the vicinity of and adjacent to the highway to be improved."

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V

The said contract was entered into by the claimant herein in good faith and with the intention on its part of performing and carrying out the same. That thereupon the claimant assembled upon the locality of said highway a plant for the advantageous prosecution of said contract consisting of Koppel cars, engine and tracks, steam shovel, concrete mixer, sand washer, horses and wagons and other implements and tools, and within a reasonable time after the execution of the contract, entered upon its performance under the supervision and direction of the Commissioner of Highways and continued in said performance until said contract was canceled by the Commissioner of Highways as hereinafter found.

VI

That pursuant to the provisions of said contract the State, by supplemental agreement with the claimant herein, dated September 28, 1914, made certain additions and deductions in the amount of work to be performed which the claimant accepted, such additional work being on the basis of its contract price, and planned to complete the same in accordance with the terms thereof, a copy of which contract is marked Exhibit No. 4 and is filed in connection herewith and made a part of this report. The amount of such additions of work to be performed was \$5,000. The amount to be deducted from that which had been ordered by the contract and specifications was \$1,953.87, making the total amount of work added to the contract, \$3,046.17, thus making the total contract price for all the work provided for of \$127, 872.67.

VII

On the 4th day of May, 1915, the State Commissioner of Highways entered an order canceling the contract for the construction of highway No. 5432 upon his determination that "the best interests of the State would be served by the discontinuance of the present contract and the completion of the road under a different type of construction." The notice of such cancellation

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was given to the contractor and a few days thereafter he was directed to remove his plant, tools and machinery from the premises.

VIII

After such cancellation by the Commissioner of Highways the engineer in charge made a final estimate of the work performed by the claimant under the contract. That the item prices in the proposal amount to the sum of \$34,627.23, thus increasing the amount of the gross sum contracted for to the sum of \$127,998.60. The amount of such work as determined by the final estimate was thereupon paid to the contractor, leaving the amount of \$93,371.37 as the contract value of the work provided for in the contract that remained unperformed.

IX

After the execution of the contract the claimant located two gravel pits, one known as the "Shappee" and the other as the "Fitzgerald." The Shappee pit was located a distance of 8,175 feet from the highway and the Fitzgerald pit from 1,200 to 1,400 feet therefrom. Thereupon the attention of the division engineer was called to the matter and he caused a field test to be made of the Shappee pit, taking a sample thereof and thereafter and on the 22d day of August, 1914, the division engineer addressed a letter to Harry E. Poole who was the inspector of construction on highway 5432 and a copy thereof was transmitted to the contractor, the claimant herein. The letter is as follows:

"This is to notify you relative to the material in the gravel bank represented by Division sample No. 8-3-B on the property of Grant Shappee, town of Horseheads, Chemung County, opposite Station 42, County Highway No. 356. That based upon a field test made by Frank M. Harris and also upon a personal inspection of this bank made by me after the same had been opened up, that the gravel in this bank is hereby accepted for use in concrete pavements on State Highway No. 5432 (1-21½-5

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mixed). Sand from this pit is accepted provided the same is washed in order to reduce the percentage of loam and to remove the coating of dirt.

“ (Signed) FREDERICK STEELE STRONG,
“*Division Engineer.*”

While a sample had been taken of the sand and gravel and its use upon the highway in question had been authorized by the division engineer, he neglected to forward a sample to the bureau of tests at Albany until after the pit had been opened and the sand and gravel had been used by the claimant and the contract had been canceled. Then it was submitted with reference to use in another highway and was accepted by the bureau of tests for second and third class concrete.

X

As to the sand and gravel in the Fitzgerald pit, a sample was forwarded to the bureau of tests by the division engineer who reported through the First Deputy State Commissioner of Highways that “this gravel may be used in second and third class concrete and for bottom course of gravel provided that the thin bedded pieces be eliminated. Sand is accepted for use in second and third class concrete provided it is washed.” Thereupon the division engineer reported to the claimant that the Fitzgerald gravel had been approved by the bureau of tests, giving him a copy of the letter that he had received with reference thereto.

XI

Under date of May 28, 1914, the Commissioner of Highways forwarded to the division engineers a circular letter providing as follows: “On account of practical difficulties attendant upon the selection of sand and gravel for concrete base for pavements due to the varying of grades of gravel found in all sources of supply and for the purpose of expediting construction work, Division Engineers are hereby instructed to use their best judgment in the selection of sand and gravel for foundation concrete and their

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judgment will be final and binding under the requirements of specifications for such materials. Samples of stone, sand and gravel for concrete base must be submitted as heretofore and such examination and test will be made as will insure of a prompt report on suitable quality and proportion for the purpose of aiding Division Engineers in reaching a correct judgment regarding such material. If urgent conditions require immediate action, Division Engineers may permit use of selected material for concrete base pending the result of tests."

XII

The claimant herein, after having received authority from the division engineer permitting the use of the sand and gravel from the Shappee and Fitzgerald pits as above found, entered into a contract with the owner of the Shappee pit under which he opened the pit by stripping the layer of earth therefrom and then constructed a railroad into the pit at considerable expense and in the construction of the roadway he used the sand and gravel obtained from said pits in the preparation of the concrete laid by him.

XIII

The type of highway contemplated by the contract was to consist of a sub-base of stone, gravel and earth upon which was to be placed a base of second class concrete upon which a layer of brick was to be placed forming the surface of the highway.

XIV

The cancellation of the said contract by the State Commissioner of Highways was not by reason of any failure on the part of the claimant to perform the contract; nor was it by reason of his use of the sand and gravel specified. At the time of the cancellation of the contract the claimant was equipped with the necessary machinery and appliances for the completion of the same within the time specified therein and was willing and able to perform thereunder and duly protested against the cancellation of the contract.

XV

The cost of the completion of the improvement of the highway under the provisions of the contract was the sum of \$64,371.17. The profits which would have accrued to the claimant had he been permitted to complete the improvement under the contract would have been the sum of \$29,000.

CONCLUSIONS OF LAW

I

By the acceptance of the sand and gravel from the Shappee and Fitzgerald pits, with full knowledge of the facts as hereinbefore found, the State waived any claim it might have had with reference to the character of the material that was used in the construction of the highway.

II

The division engineer under the authority of the circular letter issued by the Commissioner of Highways, was given the power to determine the character of sand and gravel that should be used on highway 5432 and the contractor was justified in acting upon the approval given by the division engineer to the use of the sand and gravel of the Shappee and Fitzgerald pits.

III

The claimant herein is not responsible for the neglect of the division engineer to forward a sample of the gravel and sand taken from the Shappee pit to the bureau of tests in Albany.

IV

The rights of the parties were fixed at the time of the cancellation of the contract. At that time the claimant was authorized to use the sand and gravel from the Shappee and Fitzgerald pits in the manufacture of the concrete and the cost of producing the concrete should be determined as of that time.

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V

The cost of completing the contract to the claimant at that time would have been the sum of \$64,371.37. That the profits which would have resulted to the claimant had he been permitted to complete the contract would have been \$29,000.

VI

An opinion has been prepared herein which is attached hereto and may be considered as a part of this report in so far as the law of the case is concerned.

Let judgment be entered in favor of the claimant against the State in the sum of \$29,000.

All of which is here respectfully submitted,

ALBERT HAIGHT,
Referee.

REFEREE'S OPINION.

HAIGHT, Referee.—A number of questions of law have been raised by the able Deputy Attorney-General who tried this case which require careful attention. In the first place, he contends that the contract when executed was against public policy and *ultra vires*; that under the contract the sand and gravel to be used were to be taken from the Sayre pit in Pennsylvania or to be of approved "imported material." That the claimant, knowing that there was sand and gravel near to the highway which could be more cheaply obtained, was given an advantage over the other bidders whose bids were presumed to have been made upon the theory that Sayre gravel or approved imported gravel had to be supplied. It is true that the division engineer who made the plans for the improvement of the highway in question and also made the estimate for the cost of such improvement, in making his estimate considered the cost of sand and gravel purchased from the Sayre pit in Pennsylvania, but so far as I have been able to discover, no evidence has been produced before me showing any selection of the gravel from the Sayre pit or requirement on

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behalf of the bidders to use sand and gravel from that pit. The notices advertised in the paper for the reception of proposals are silent upon the subject and no evidence is given showing that the claimant herein had any further information upon the subject than all of the other persons who submitted bids or proposals in answer to such advertisement. I, therefore, have reached the conclusion that no favoritism was shown in the letting of the contract and consequently it should not be condemned as being obtained through means that were detrimental to public policy.

It is further contended on behalf of the Attorney-General that the division engineer had no power to approve of the use of the Shappee or Fitzgerald gravel for the reason that it was local material and not approved imported material.

In the "information for bidders" there is a provision that where the use of local sand and gravel is anticipated the proposal sheets will give the information as to the location of such material and the items under which it may be used, and then further provides that "when such information is not given in the proposals the contractor will be required to furnish approved imported material." It is true that the proposal sheet contains no intimation of the location of material which may be used. Consequently the duty devolves upon the successful bidder of furnishing approved imported material; in other words, imported sand and gravel.

Again, upon the plans prepared by the division engineer there is noted "no local material shall be accepted for second or third-class concrete." Thus we have under the "information for bidders" and the notations upon the plans, a prohibition from using local materials and a requirement that imported materials shall be used.

The question that arises is as to what is meant by the term, "approved imported material" and by the term "local material." Upon these questions considerable testimony has been taken of experts who have given their views as to what was meant by the term "imported material" and by "local material." A number of the experts were of the opinion that it is "local" material, if it can be reached by the contractor's outfit that is maintained for the purpose of constructing the highway under the contract; that

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it is "imported" material if it is such as can be brought in by a common carrier. I hesitate about adopting these views. The provision with reference to approved imported materials is found in the printed "information for bidders" and consequently is attached to and made a part of every proposal sheet and every contract that is issued by the State in highway cases for the improvement of highways and should we construe the provisions as meaning material that had to be brought in by common carrier in this contract, a like construction would have to be given in all the other contracts. This might seriously embarrass the State as well as contractors, especially in cases of the improvement of highways that are remote from the lines of common carriers.

Again, under the definition given, the distance does not appear to be material for it would be imported material if the sand and gravel was brought in by railroad whether it be five, ten or one hundred miles distant.

The ordinary meaning of "imported" as commonly used and given in the dictionary is material *brought in from* a foreign country. I suppose, however, it will not do to attribute to the draftsman of the "information for bidders" the intention to limit the use of gravel and sand to that which is brought in from a foreign country, for if such was his purpose and intent it might well raise a more serious question as to whether public policy would sustain the act of an official who should require imported sand and gravel from a foreign country to be used, when equally as good may readily be found in great quantities within the boundaries of our own country.

To avoid any questions of public policy as well as questions of favoritism between public officers and the owners of gravel pits, I suggest that a restricted meaning be given to the term "approved imported material" appearing in the "information for bidders." The words "brought in" are important and form an essential part in defining "imported." By construing the term as "material *brought in*" from a place other than where it is to be used, by whatever means, public or private, we should be in accord with the usual practice of the Highway Department and that of the division engineer who drew the plan, made the indorsement thereon and then approved of the use of the sand and gravel from

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the Shappee and Fitzgerald pits. It also would be in accord with the note that he made upon the plans with reference to "local material" and with that where he specifies that the "gravel filler and stone for Item 40 shall be *local* material, * * * *adjacent* to the highway to be improved." Here clearly we find a definition limiting local material to that which is adjacent to the highway, and although he was speaking with reference to another item in the specifications, it furnishes a guide by which we may ascertain his meaning where he uses the word "local" in the other provision of the contract.

This may be a somewhat technical discussion of the meaning of the terms, but it is the only interpretation of the terms used that has occurred to me which fully protects the interest of the State, the contractor and the public. The State is fully protected by the provision requiring that the gravel and sand used shall be approved by the bureau of tests. Here we have a complete protection as to quality. The contractor is protected for he is at liberty to procure the sand and gravel necessary for use upon the construction of the highway from such gravel and sand pits as may suit his convenience so long as it answers the requirements as to quality and is approved by the State bureau. The public interest is protected for it opens the door wide to every person owning a gravel pit. He may enter the market and compete with every other owner of gravel in the sale of his material provided it answers the requirements as to quality. It avoids favoritism on the part of the public officials and prevents them from favoring one owner of a pit over that of another, thus destroying a healthy competition in the traffic of the material. It permits sand and gravel to be brought in by whatever means that will be most economical and does not deprive contractors of the power to perform their contracts in cases where the highways are remote from railroads, canals or navigable rivers or other common carriers.

For the reasons given I am therefore inclined to adopt the interpretation suggested, and hold that the division engineer had the right to sanction the use of the gravel and sand from the Shappee and Fitzgerald pits.

The next question raised is to the effect that the bureau of tests had not approved the use of the sand and gravel in the Shappee

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and Fitzgerald pits for this particular highway and that the test of the sand and gravel from the Shappee pit was not made until after the cancellation of the contract herein. It is true that so far as the Shappee pit is concerned, the division engineer took a sample, subjected it to a field test and gave the contractor written approval for its use and then neglected to forward the sample on to the bureau of tests until after the contract was canceled. It was then forwarded, however, and a test made and its quality for the use in second and third class concrete approved. But as to the Fitzgerald pit, a sample had been forwarded for use in the construction of a nearby highway and the test made had been reported to him so that he knew the character of the material at the time he gave his consent to the claimant herein for its use. We thus have the character of the material determined in each pit by the bureau of tests. True, it was not specified by the bureau that it should be used in the construction of the highway in question, but the contract for this highway only called for concrete layer as a base upon which a layer of brick was to be placed, forming the surface. It was not intended that the concrete was to be used as the surface of the highway upon which it was to be subjected to the wear of the traffic upon it, but was to be only the base upon which it was intended to support the surface layer which was intended to bear and sustain the wear from the traffic. I, therefore, assume that if the sand and gravel from these pits was recommended as suitable for second class concrete in the construction of other highways in the vicinity, it certainly was suitable for the construction of the base course of the highway in question.

As to the failure of the division engineer to forward the sample of gravel taken from the Shappee pit, it was the act of the official of the State for which the contractor was not responsible, and in view of the fact that the bureau of tests has subsequently found the material suitable and approved its use, it is apparent that the State has lost nothing by reason of such failure. The use of the sand and gravel from these pits by the claimant in the manufacture of the concrete laid by him in the highway was open and known to all of the officials. The monthly estimates of the work performed under the contract made by the engineers were reported

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to the Commissioner of Highways by the engineers, together with the final estimate made after the contract had been canceled and the payments thereon were made by his authority. Such report and payment amounted to an acceptance of the work done both as to its character and material used and forms the basis upon which the question of profits may properly be determined.

The claimant herein seeks to recover damages resulting to him by reason of the equipment he had provided and installed for the performance of the contract and also for anticipated profits which might be made upon the construction of the work, provided for by the contract. The rule, as I understand it in such cases, is that the measure of damages is the amount of the party's loss, and this may consist of two classes, namely, actual outlay and anticipated profits. The first is the amount that he has been induced to spend on the faith of the contract in the performance thereof which may include a fair allowance for his own time and services. The second is for the anticipated profits he may have made had he been permitted to perform the contract subject to the rules of law as to the character of the profits which may thus be claimed. *Long Island C. S. Co. v. City of New York*, 204 N. Y. 73; *U. S. v. Behan*, 110 U. S. 338; *Masterson v. Mayor of Brooklyn*, 7 Hill, 61.

It appears that when the contract was executed the claimant purchased and installed an expensive plant consisting of railroad tracks, Koppel cars, engine, steam shovel, concrete mixer, washer, horses, wagons, tools and implements, for the speedy and economical construction of the highway. It is claimed that the amount of damages suffered by reason of the amount expended in such purchase and installing with the depreciation in value resulting therefrom amounts to nearly \$20,000. The damages thus sustained were undoubtedly large, the exact amount of which I have not seen fit to determine for reasons that will later appear.

Under the provisions of the contract all of the necessary material, implements, tools, labor, services, etc., to perform the contract were to be furnished by the contractor who was to accept as full compensation therefor the amount of the summation of the products of approximate quantities and of work performed multi-

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plied by the unit price bid therefor. The cancellation of the contract by the State prohibited the actual performance of the work provided for under the contract and therefore the contractor was powerless to earn any pay thereunder or in any manner indemnify himself for the money expended in equipment. Therefore, such damages would be properly awarded hereunder were it not for the fact that the claimant has sought to recover as damages the anticipated profits and in my report herein I have ascertained the amount of such profits and have awarded judgment therefor. The design of this award is to place the claimant in the identical situation he would have been in had the cancellation of the contract not taken place and he had been permitted to proceed with the work and perform the contract in its entirety. He then would have been compelled to reimburse himself for the amount expended in the purchasing and installing of the plant out of the profits, and would have to suffer the depreciation that resulted therefrom, accepting as full compensation therefor the amount of the summation of the products of the approximate quantities and of work performed based upon the unit prices.

The contractor in making his bid is presumed to have taken into consideration the cost of labor, his overhead expenses, the amount of premium to be paid upon the bond and the cost of installing his plant and to have made the same sufficiently large to reimburse himself therefor out of the profits.

The profits having been determined and adjudged, all items of damage of the character of those above specified become merged therein. The claim for damages, arising from the contract made by the claimant for the acquiring of the Shappee gravel pit, is also merged in and included in the profits. There was no bid specially for sand and gravel, but the bid was for a specified sum per yard of concrete in which the sand and gravel formed a part of the composition. The payment for the concrete, therefore, includes the sand and gravel.

There is also a claim presented with reference to the costs of transportation, etc., to Albany and return for the purpose of conferring with State officials. These items doubtless were not included in the other items referred to which were deemed merged in the award made for profits. These visits were made by

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Mr. Connolly partly on his own volition and one or two, perhaps, on the invitation of one of the State officials. The conversations pertained chiefly to the negotiations looking toward the changing of the type of road and of his taking a new contract therefor. They were not expenditures made in the performance of this contract and for that reason I think the amount should not be included as damages hereunder.

The leading case upon the subject of damages in this State is that of *Masterson v. Mayor of Brooklyn*, *supra*. The legal questions involved in that case are similar to those in this case. In that case the contract had been entered into to furnish the marble cut and carved at a price specified per square foot, according to plans and specifications for the construction of a city hall. A quantity of marble had been furnished and the building had been constructed in part when the city concluded to stop the work, and refused to accept further marble, including a quantity which had been quarried and carved and was ready for delivery. The court held in that case that as to the marble that had been quarried and cut ready for delivery it should be paid for at the contract price, less its market value or what it could be sold for. As to the rest of the marble called for by the contract which had not been quarried or cut, the contractor was awarded as damages what his profits would have amounted to had he been permitted to perform. In this case partial performance had been made. So far as the work had been performed, the contractor was paid in full therefor under the final estimate. Had he not been paid in full he would have been entitled to include the amount thereof as an additional item of damages herein. He has been allowed to recover his profits on the part of the contract left unperformed in accordance with the rule laid down in that case. I have, therefore, treated it as a guide in the disposing of this case.

The claim is made that the State has admitted the right of the contractor to recover for the amount expended in purchasing the Koppel outfit if the referee should find that the contract was not *ultra vires* and had been properly performed. I have conceded in this opinion that such damages would be recoverable herein were they not merged in the profits for which I have

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allowed a recovery. As I construe the stipulation, the State did not intend to go farther than to concede the right of the claimant to be reimbursed for such expenditures in case he was not permitted to recover profits.

During the trial of the case a number of exceptions were taken to the admission and rejection of evidence offered by the parties. In many cases consideration was reserved for the final submission of the case at which time the attorneys were to be given an opportunity to discuss any legal questions involved. None have been discussed upon the argument or in the briefs of counsel with the exception of that taken to the admission of the testimony of the Commissioner of Highways who under objection stated that had the contract continued on for completion he would have revoked the order permitting the use of sand and gravel from the Shappee and Fitzgerald pits. He had not, however, revoked the order that had been given by the division engineer up to the time of the trial of the case and the delivery of his testimony. He canceled the contract, as he states, for the reason that the brick which was to be used in the surfacing of this road was to be manufactured at Elmira Reformatory and had not been so manufactured. Consequently the State could not avail itself of such brick.

As I view the case, the rights of the parties became fixed on the day the contract was canceled. This was distinctly held in the leading case upon the subject, *Masterson v. Mayor, supra*. The contractor then had the right to maintain action for the recovery of his profits, and those rights he could not well be deprived of by orders of the character mentioned in the testimony. I, therefore, am of the opinion that the testimony was improperly received and should be disregarded.

The cost of completing the work under the contract has been determined by expert testimony. Prominent engineers on behalf of the claimant and the State have given their views as to the cost. They were able, experienced engineers and I discovered no reason why I should not give to each credence as exercising his best judgment. They are, however, widely apart in their determinations. Giving to each, however, equal weight, and striking a

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mean difference between the lowest expert on behalf of the claimant and the highest expert on behalf of the State, it will be found that the cost of construction would have been the amount specified in the findings, and, excepting a variance of \$1.37, the profits would be the sum of \$29,000, for which judgment is awarded.*

LANE BROTHERS COMPANY v. STATE OF NEW YORK

No. 1474-A

(Dated December 9, 1916)

Claim for Damages on Barge Canal Contract

The claimant entered into a contract with the State which, among other things, provided for the excavation of a part of the canal prism of the Barge canal, the territory embraced in the contract being a part of the new route established for the Barge canal for the purpose of making a crossing of the Genesee river above the city of Rochester. The new route crossed the right of way and tracks of several railroad companies. Under the contract the claimant was required to so conduct its work as not to interfere with the railroad traffic. The contract provided that "It is expected that the masonry abutments and the superstructure necessary to carry the railroads over the canal prism together with so much of the excavation and backfilling as may be necessary therefor will be carried out by the railroad companies." The railroad companies, with one exception, refused to construct the masonry abutments or to construct the bridges necessary to convey the railroad tracks over the canal prism and refused to allow the claimant to excavate underneath their tracks or so near thereto as to endanger their traffic over such tracks. The State officials concerned did not reach any agreement with the railroad companies with reference to construction of bridges over the prism of the proposed canal and consequently they did not direct the claimant to take possession of or excavate the earth underneath the railroad tracks. The claimant made numerous complaints to the State alleging that it was suffering damages by reason of delays occasioned from not being able to excavate under the railroads or to draw the water accumulating in the excavations through the embankment underneath the railroad tracks. On claimant's application the state finally cancelled its contract, the claimant reserving its claim against the State for damages growing out of the alleged breach by the State of the contract and out of the alleged failure or neglect of the State to provide the claimant with the site of the contract. The State contended that it had complied with all the provisions of section 4 chapter 147, Laws of 1903, by which it had appropriated the lands required for the canal prism under the railroad tracks and that the State or its contractor had the

* Judgment unanimously affirmed in 177 App. Div. 938.

Report by Hon. Albert Haight

right to enter thereon and carry out the provisions of the contract. The referee held: (1) That while it is not the duty of the State to physically dispossess the railroads from the site of the canal, it is its duty to either contract with each railroad to build its own crossing, or to contract with some other person to construct one for it: (2) That as the contract in this case does not require the claimant to construct the abutments of any of the railroad bridges over the canal, but on the contrary prohibited the claimant from interfering with railroad traffic, the claimant could not, therefore, excavate the lands under the tracks until the crossing of the railroads over the canal had been constructed; and it consequently followed that the state was obligated within a reasonable time to provide the claimant with the sites of the railroad companies so that it could perform its contract in excavating the prism of the canal under the railroad tracks. The state failed in this duty toward the claimant, and, therefore, it became liable to the claimant for the damage it had sustained by reason of such failure.

The certificate appropriating the lands under the railroad tracks was signed by the special deputy engineer and it was contended that under the decision of the Court of Appeals in *Ontario Knitting Co. v. the State* 205 N. Y. 409, the appropriation was void. The referee held that the facts were different in the present case and that the appropriation was valid under the referee's decision in *Pratt v. State*, affirmed by the Court of Appeals in 219 N. Y. 554.

CLAIM against the State of New York for damages arising from a failure of the State to put a Barge canal contractor in position to execute its contract.

O'Gorman, Battle & Vandiver, attorneys for claimant, represented by Almuth C. Vandiver.

Egburt E. Woodbury, Attorney-General, attorney for defendant represented by Edmund H. Lewis, deputy.

REPORT BY HON. ALBERT HAIGHT, OFFICAL REFEREE.

To the Honorable, the Court of Claims of the State of New York:

Pursuant to an order of your honorable court, bearing date the 19th day of August, 1915, entered upon a stipulation of the Attorney-General with the attorneys of the claimant herein, there was referred to me, pursuant to chapter 229 of the Laws of 1911, to hear, try and determine the issues involved between the claimant and the State upon the claim presented against the State, a copy of which order, stipulation and claim is on file with the clerk of your court.

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On the 20th day of September, 1915, at my office in the city of Buffalo, there appeared before me on behalf of the State, the Attorney-General, Egbert E. Woodbury, by Edmund H. Lewis, Deputy Attorney-General, and on behalf of the claimant, O'Gorman, Battle & Vandiver, by Almuth C. Vandiver, and B. B. Cunningham, of counsel.

Thereupon the oath of the referee prescribed by law was waived by the stipulation of the parties and the trial commenced and was continued from time to time and upon divers subsequent days by adjournment and the request and consent of the parties herein at the said office of the referee in the city of Buffalo and at the Educational Building in the city of Albany until the evidence was closed and the case finally submitted by the attorneys, with briefs filed and requests to find, which were finally received on the 14th day of October, 1916.

Now, after hearing Almuth C. Vandiver, attorney for the claimant, and Edmund H. Lewis, Deputy Attorney-General, on behalf of the State, and due deliberation having been had, I do find and decide as follows:

FINDINGS OF FACT

I

The claimant, Lane Brothers Company, is a corporation organized and existing under and by virtue of the laws of the State of Virginia, and has been authorized to transact its business in the State of New York.

II

On the 7th day of April, 1910, claimant entered into a written contract with the State of New York pursuant to chapter 147 of the Laws of 1903 and amendatory laws relative to the improvement of the Erie, Oswego and Champlain canals, in which, among other things, the claimant agreed to completely excavate the Erie canal prism beginning at the Genesee river on the east end at approximately station 2444 and continuing to the east end of contract No. 6 at approximately station 2571, a length of two and

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forty-three one-hundredths miles in and near the city of Rochester; to construct a guard lock at approximately station 2466-2472, about 2,500 feet from the east end of the contract; to construct the abutments for new highway bridges where the highways intersected the line of the canal at Scottsville road at approximately station 2453; Brooks avenue at approximately station 2498, and Chili road at approximately station 2537; to construct a concrete approach wall with snubbing posts therein in place easterly from the guard lock and to perform all appertaining work; which contract was designated as contract No. 21.

III

Under the provisions of the contract the claimant agreed to commence work thereon on or before May 1, 1910, and to progress the same to completion on or before May 1, 1913.

IV

The Claimant agreed in said contract to furnish all work, labor, services and material of every kind and to do and perform each and every act and thing necessary or proper for the improvement of the Erie Canal by excavating the canal prism and constructing guard lock, highway bridge abutments, and all appertaining work between Genesee river and the east end of Contract No. 6 in accordance with the plans and specifications for said work, which are marked as exhibits in this case and are filed herewith and made a part of this report, and to fully complete said improvements in accordance with the true intent and meaning in said plans and specifications.

V

The Claimant further agreed that it would conduct its work in compliance with all the laws of the State of New York and the ordinances of any City, Village or Town and the lawful directions of the officers, agents or representatives of the State or of said City, Village or Town.

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VI

The claimant and the State mutually agreed that time is of the essence of the contract and that the damages to the State for failure of the contractor to have fully completed the work on or before the date last mentioned shall be \$70 per day for each day after the said date that shall elapse before the work shall be fully completed, which amount shall in no event be considered as a penalty or otherwise than the liquidated or adjusted damages of the State because of said delay and which damages the contractor shall promptly pay, and which damages the Superintendent of Public Works may retain from any moneys which otherwise shall be payable to the contractor, and in the event that the moneys payable as aforesaid are not sufficient to fully compensate the State because of such delay, then the contractor promises and agrees to pay the balance of said moneys to the State promptly upon the demand of the Superintendent of Public Works.

VII

It is further stipulated that in the event that the State shall not have fully acquired possession of the lands, structures or waters within the contract site when said contractor is ready to begin actual operations, the time for the completion of this contract shall be deemed extended for a period equal to the time of the actual delay caused thereby.

VIII

“Site” as defined in the contract is as follows: The term “site” is defined to mean the area included within the end limits of this contract as described and the lines marked and the boundaries of the right-of-way acquired or to be acquired for the canal.

IX

The plans, diagrams and maps furnished to claimant and examined by him prior to the bidding, are a part of the contract and showed the intersection of the site of the canal by ten railroad tracks as follows: Four tracks belonging to the New York

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Central and Hudson River Railroad Company, crossing the canal site about 200 feet from the easterly end of contract No. 6 at approximately station 2570; four tracks belonging to the Buffalo, Rochester and Pittsburgh Railway Company, crossing the site of the canal at approximately station 2535; one track belonging to the Western New York and Pennsylvania Railroad Company, referred to herein as the "Pennsylvania Terminal Track," crossing the site at approximately station 2482; one track operated by the Pennsylvania Railroad Company as lessee, crossing the site of the canal at approximately station 2448.

X

It is further provided in the special specifications that "it is expected that the masonry abutments and superstructures necessary to carry the railroads over the canal prism, together with so much of the excavation and backfilling as may be necessary therefor, will be carried out by the railroad companies. The contractor shall extend all excavations, backfilling and other work that may be necessary to make proper junction with the work of the railroad companies and to complete the canal prism as indicated on the drawings. All of this work shall be carried out at contract prices."

XI

Attached to the contract and specifications furnished to contractors proposing to submit bids, was a statement entitled "information for proposers" among which are the following provisions: "The estimate of quantities is to be accepted as approximate only, proposers being required to form their own judgment as to quantities and character of the work by personal examination upon the ground where the work is proposed to be done; and on the specifications and drawings relating thereto or by such other means as they shall choose." The attention of persons intending to make proposals is specifically called to paragraph 10 of the form of contract which debars a contractor from pleading misunderstanding or deception because of estimate of quantities, correct location or other information exhibited by the State.

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Under the provisions of section 7, chapter 147 of the Laws of 1903, the Superintendent of Public Works cannot award a contract where the total of the bid to be considered is more than 10 per centum in excess of the engineer's estimate for the work to be done or where any item of the bid is more than 20 per centum in excess of any item as estimated by the engineer, excepting with the approval of the State Engineer and Surveyor and the Canal Board.

XII

In the itemized proposal submitted by the claimant is the following: "The undersigned also declares that they have carefully examined the annexed form of contract and specifications and the drawings therein referred to and will provide all necessary machinery, tools, apparatus and other means for construction and do all the work and furnish all of the materials called for by said contract and specifications and requirements under them of the State Engineer for the following sums, to wit:" then follows the itemized bid for each class of work required to be performed and for all kinds of material specified in the engineer's estimate.

XIII

Under the provisions of the contract, "the contractor agrees that he has satisfied himself by his own investigation and research regarding all the conditions affecting the work to be done and the labor and material needed and that his conclusion to execute this contract is based on such investigation and research and not on the estimate of the quantities or other information prepared by the State Engineer and that he shall make no claim against the State because any of the estimates, tests or representations of any kind affecting the work made by any officer or agent of the State may prove to be in any respect erroneous."

And the claimant further agrees: "In case of any discrepancy or ambiguity in the plans, specifications or maps, or between them, the matter must be immediately submitted to the State Engineer who shall adjust the same, and his decision in relation thereto will be final and conclusive upon the parties."

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And the claimant further agrees: "The contractor shall immediately after the execution of this contract begin the necessary preparation to do the work and promise and agree that the work shall be fully completed on or before the first day of May, 1913." The contractor agrees to notify the Superintendent of Public Works and the State Engineer one week in advance of actual operations in the event that the State shall not have fully acquired possession of the lands, structures or waters within the contract site when said contractor is ready to begin actual operations.

XIV

Under the terms of the specifications which form a part of the contract, claimant agreed that "Coffer dams, pumping, bailing and draining shall include the furnishing, construction, maintenance and removal of coffer dams and similar work wherever such may be required to enable the construction to be carried out in a proper and satisfactory manner. The excavation, maintenance, and when so directed by the engineer, the re-filling of all ditches, the furnishing and operation of pumps and appliances and the providing of all material, labor, etc., required to prevent interference with the work by water, ice or snow, irrespective of any depth to which the excavation may be ordered to be carried, special care shall be taken to thoroughly drain foundations of all structures. * * * Coffer dams, pumping, bailing and draining will be paid for out of contract price therefor."

XV

Under the special specifications the claimant further agreed, "Where it becomes necessary that the work called for under this contract be prosecuted simultaneously with work under another contract in the same vicinity, the contractor for contract No. 21 will be required to co-operate with such other contractor or contractors in obtaining the best results and the decision of the State Engineer shall be final and binding on the contractor as regards the co-ordination of the work on said contracts where such work abuts or adjoins."

XVI

Under the provisions of the special specifications it is agreed as follows:

"The contractor shall maintain uninterrupted traffic for vehicles and pedestrians at crossings of the new canal with highways at or about station 2453 plus 35 (Scottsville road), station 2497 plus 73 (Brooks avenue), station 3537 plus 45 (Chili road).

"He shall whenever necessary build temporary structures, satisfactory to the engineer and shall maintain them in satisfactory condition until the permanent structures are completed and open to traffic; whereupon he shall entirely remove such temporary structures. If, however, the permanent structures are not completed when this contract is otherwise satisfactorily completed, the temporary structures shall be put in safe and satisfactory condition by the contractor and shall become the property of the State. The contractor shall also conduct his work, moving of plant, etc., so as not to interrupt railway traffic."

XVII

Under the provisions of the contract the contractor was not required to construct the abutments for the railroad bridges thereon over the sites occupied by the aforementioned railroads nor construct the bridges thereon.

XVIII

The contract further provides that the State Engineer shall between the first and fifteenth day of each month make and file with the Superintendent of Public Works an estimate of the amount, character and quality of the work done and of material which has been actually put in place in accordance with the terms and conditions of this contract during the preceding month and compute the value thereof. The Superintendent of Public Works will within fifteen days thereafter at his office in the city of Albany, N. Y., pay to the contractor from the money which shall have been properly appropriated for that purpose, a sum not to

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exceed 90 per cent of the value of the work performed and materials furnished as so certified by the engineer, retaining not less than 10 per cent thereof until the contract shall have been completed and approved by the State Engineer and the Superintendent of Public Works.

XIX

The "information for proposers," the preliminary estimates of quantities and costs by the engineer, the itemized proposal by the contractor, the contract, specifications and special specifications were marked Exhibit No. 2 in the case and are hereby filed in connection with this report and made a part thereof; each provision thereof being found as a fact in the case to which reference may be had without specifically repeating such provisions in this report.

XX

Approximately two weeks prior to the letting of the contract herein the claimant, by its chief engineer and two contractors, engaged for the purpose, made an examination of the site of the work and the general conditions affecting it preliminary to submitting a proposal to perform the work required under the terms of the contract. At that time the contract, specifications and plans for the construction of the work were on file in the office of the Superintendent of Public Works at the Capitol at Albany, N. Y.; at the office of the superintendent of the middle division of the canals at Syracuse, N. Y.; at the office of the superintendent of the western division of canals at Rochester, N. Y.; at the canal office, Buffalo, N. Y., and were open to the inspection of those intending to submit proposals. The contract and specifications were annexed to the itemized proposal, submitted by the claimant herein.

XXI

The railroad companies, with the exception of the Buffalo, Rochester and Pittsburgh Railway Company, neglected and refused to consent to the construction of masonry abutments or to construct the bridges necessary to convey their railroad tracks

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over the canal prism, and the railroad companies, with the exception of the Buffalo, Rochester and Pittsburgh Railway Company, refused to allow the contractor to excavate underneath their tracks or so near thereto as to endanger their traffic over such tracks.

XXII

The contractor orally and in writing on numerous occasions complained to the engineers in charge, alleging that the company was suffering damages by reason of delays occasioned in not being able to excavate under the railroads or to drain water accumulating in the excavation through the embankment underneath such tracks.

XXIII

Neither the State Engineer, the Superintendent of Public Works, the special examiner and appraiser nor the Canal Board reached any agreement with the railroad companies, except the Buffalo, Rochester and Pittsburgh Railway Company, during the life of the contract, with reference to construction of bridges over the prism of the proposed canal, nor did they proceed to construct the same until after the termination of the contract, and consequently they did not direct the contractor to take possession of or excavate the earth underneath such railroad tracks, nor request it to do so.

XXIV

On October 23, 1912, the contractor petitioned the State officers to cancel its contract and to relieve the company from further liability thereunder, which application was on January 30, 1913, refused, and thereupon the contractor proceeded with the work under the contract until the 16th day of August, 1913.

XXV

After the contract had been entered into by the parties, the claimant commenced work thereon on or about the 15th day of April, 1910, and continued operations thereupon until the 16th day of August, 1913, at which time it petitioned the Canal

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Board and the State officers to cancel the contract upon the ground that the State had not furnished the contractor with the possession of the sites of the land underneath the railroad tracks above enumerated so that it could complete the performance of the contract by excavating the prism of the canal thereunder.

That thereafter and on the 30th day of September the Canal Board passed a resolution canceling the contract upon the following agreement entered into between the claimant and the State:

“Now, therefore, in consideration of the sum of one dollar lawful money of the United States to the undersigned in hand paid at or before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, and further in consideration of the said alteration of said contract and the payments to said Company of the amount of the retained percentages held by the State under said contract, the undersigned has remised, released and forever discharged, and by these presents does for itself, its successors and assigns forever release and discharge the said The State of New York of and from any and all actions, causes of action, suits, sums of money, damages, claims and demands whatsoever which against the State of New York it ever had, now has, or which its successors and assigns can, shall or may ever have in so far and to the extent as the same pertains or relates to the loss of future or anticipated profits in connection with the uncompleted portion of the said contract; that is, all claims for damages arising out of its inability to complete said contract, expressly reserving, however, to the said Contractor its claim, if any, against the State for any and all other items of damage growing out of the alleged breach by the State of the said contract and out of the alleged failure or neglect of the State to provide said Contractor with the site of the said contract as in and by said contract provided.

“It is expressly understood and agreed, however, that neither the termination nor cancellation by the Canal Board of this contract, nor the re-letting of the work, nor the payment to the said Contractor of his retained percentage, nor anything in the instrument contained shall be construed as an admission by the State

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that it is or has been guilty of any breach of said contract or of the existence of any claim of said Contractor for the recovery of any damages or sum of money whatsoever in connection with the said contract. That the State on the contrary reserves the right, without any prejudice arising out of the facts or circumstances as aforesaid, to challenge, contest or deny any and all of such claims which may be made by the said Contractor."

XXVI

The total contract price for the entire work was \$1,323,150; the value of the work performed at the time of the closing of the contract was \$948,999.89, which was 71.7 per centum or approximately 72 per cent of the entire contract.

XXVII

After the termination of the contract the engineer within a reasonable time filed his final estimate under which the claimant was paid the amount remaining due upon the contract in so far as it had been performed, including the 10 per cent that had been retained from the former monthly estimate, amounting in the aggregate to the sum of \$948,999.89.

XXVIII

By section 3, chapter 147 of the Laws of 1903, the Superintendent of Public Works and the State Engineer were directed by the Legislature to improve the Erie canal along a route therein defined, a part of which is as follows: "Thence running across the country south of Rochester to the Genesee river near South Park. Here crossing the river in a pool formed by the dam stationed at or near the Johnson and Seymour dam."

XXIX

Chapter 147 of the Laws of 1903 defines the width and depth of the improved Barge canal and provides for the acquisition of lands the appropriation of which is necessary.

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XXX

Pursuant to the directions contained in chapter 147 of the Laws of 1903, the State Engineer and Superintendent of Public Works definitely located the Barge canal by means of maps and surveys through the town of Chili, Monroe county, N. Y., at the point where it intersects the Genesee Valley canal, said point being within that part of the Genesee Valley canal lying between the point where Allen's creek feeder enters the same and a point two and forty-three one-hundredths miles south of the junction of the Erie canal and the Genesee Valley canal in the city of Rochester, N. Y. The site of the canal embraced in contract No. 21 is included in the new location above described.

XXXI

On the 18th day of May, 1910, the State of New York appropriated for canal purposes, pursuant to statute, the lands underneath the rails of the New York Central and Hudson River Railroad Company within the site of contract No. 21.

XXXII

On the 28th day of May, 1910, the State of New York appropriated for canal purposes, pursuant to statute, the lands underneath the rails of the Buffalo, Rochester and Pittsburgh Railway Company within the site of contract No. 21.

XXXIII

On the 24th day of May, 1910, the State of New York appropriated for canal purposes, pursuant to statute, the lands beneath the rails of the Genesee Valley Terminal Railroad Company which had been leased to the Western New York and Pennsylvania Railway Company and subsequently leased to the Pennsylvania Railroad Company which at that time was operating the same as lessee, within the site of contract No. 21.

XXXIV

At the time of the execution of contract No. 21 the State held title in fee to the lands comprised within the Genesee Valley canal occupied by the tracks of the Western New York and Pennsylvania Railway Company and operated by the Pennsylvania Railroad Company (as lessee), a corporation organized and existing under the laws of the State of Pennsylvania, at the point where the site of contract No. 21 crosses the same. That the State through the Superintendent of Public Works on the 30th day of September, 1881, granted a permit or license to the Genesee Valley Canal Railroad Company, of which the Western New York and Pennsylvania Railway Company is lessee, to lay its tracks in the bed of the Genesee Valley canal, "reserving, however, to the State of New York such right of re-entry and re-occupancy on the part of the State as the free and perfect use of the canals of the State of New York may at any future time require," which license was revoked in so far as the land was necessary for the construction of the Barge canal in contract No. 21, on May 2, 1910.

The appropriation maps aforesaid were each signed by the Special Deputy State Engineer and were not signed by the State Engineer. The Canal Board and the Superintendent of Public Works, however, waived any question with reference thereto and took possession of the newly located canal in obedience to the requirement of the statute under which the same was located.

XXXV.

On or about the 21st day of August, 1911, an agreement was entered into by the Buffalo, Rochester and Pittsburgh Railway Company with the special examiner and appraiser of the State of New York, which provided for the payment of a railway bridge to be constructed by said railway corporation over that part of the site of contract No. 21 covered by appropriation map No. 2170. That attached to said agreement is a duplicate copy of the appropriation map No. 2170, which map was referred to therein as Exhibit A and is stated to cover the lands formerly belonging to

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the Buffalo, Rochester and Pittsburgh Railway, appropriated by the State of New York for Barge canal purposes. That said agreement recites compliance with the terms of chapter 147 of the Laws of 1903 and acts amendatory thereof in relation to making the appropriation of the property covered by appropriation map No. 2170. That subsequently the railway company entered into an agreement with the claimant herein to construct the abutments on either side of the canal upon which the bridge crossing the same was to be installed. That such abutments were constructed and the bridge finally installed thereon during the month of December, 1912.

XXXVI

Upon the neglect or refusal of the railroad companies to construct bridges over the canal at the points where their right of way intersected the same, it became the duty of the State to construct such bridges or let contracts therefor and cause the same to be constructed within a reasonable time after the claimant had entered into the performance of its contract. That such reasonable time was eight months or by the 1st of January, 1911.

That the State neglected to construct such bridges or to enter into contracts for the construction thereof with the railroads or other persons within such reasonable time and with the exception of the Buffalo, Rochester and Pittsburgh Railway Company, no such contracts were made or bridges constructed during the life of the contract.

XXXVII

The railroad companies, other than that of the Buffalo, Rochester and Pittsburgh Railway Company, refused to allow the contractor to enter upon their respective rights-of-way and to construct the canal underneath their tracks or to approach so near as to endanger the embankment on which their respective railroads were constructed or to in any wise endanger the traffic of their respective roads over the same. That such roadbeds and embankments thereunder became barriers preventing the contractor from passing his engines, cars, tracks and shovels from

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one portion of the canal that was to be excavated under his contract to another portion thereof, thus delaying and making the work more expensive and operated to prevent gravity drainage from the prism of the canal through its excavation. That by reason thereof the claimant was prevented from completing the excavation of the canal underneath the tracks of the railroad crossings and the claimant suffered damages by reason of the prolonging of his work and the delays above mentioned.

XXXVIII

The claimant herein on the 27th day of February, 1914, filed in the office of the State Board of Claims and in the office of the Attorney-General respectively, a written notice of intention to file a claim against the State pursuant to section 265 of the Code of Civil Procedure. The claim herein was filed in the office of the clerk of the State Board of Claims and in the office of the Attorney-General on or about the 25th day of March, 1914, which claim was numbered 1474-A.

XXXIX

Contract No. 6 for excavating the canal westerly from the westerly end of contract 21 was executed on the 3d day of May, 1905, and was to be completed in thirty-six months. On the 1st day of May, 1908, the time of the contractor was extended to November 15, 1909. On that date the State again extended the time for the completion of the contract to November 15, 1910, and then again, after contract No. 21 had been entered into the time was extended from November 15, 1910, to September 15, 1911, at which time approximately the contract was actually completed.

That about 2,000 feet westerly from the easterly end of contract No. 6 a culvert had been constructed through which the water of the canal between the guard gate to be erected on contract 21 and the guard gate westerly therefrom could be drained. It also would afford drainage to contract 21 during its excavation after the completion of contract No. 6 had it not been for the barrier created by the embankment upon which the New York Central and Hudson River Railroad Company crossed the canal.

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XL

At the time contract No. 21 was entered into, it was supposed that the prism of contract No. 6 would be available for gravity drainage on contract 21 by November 15, 1910, the date at which the contract required its completion, or, if not then completed, that it would be completed by the time that the New York Central Railroad Company or the State had constructed its bridge across the canal, by January 1, 1911.

XLI

Under the special specifications of contract No. 21, it is provided: "That the guard lock with gates, etc., shall be completed before any excavation is done east of the Scottsville Road." The purpose of this provision was to prevent the water from flowing into the prism of the canal from the river beyond the place at which the guard gate had been located. This would necessitate the use of pumps to dispose of the water accumulating in the prism of the canal east of the guard lock until the excavation could be completed to the river and its entrance therein constructed. The cost thereof would approximate \$4,000.

XLII

In the engineer's preliminary estimate of quantities and cost the estimates for coffer dams, pumping, bailing and draining was the lump sum of \$4,000. The claimant in its itemized proposal states the same sum for coffer dam, pumping, bailing and draining and that becomes one of the provisions of the contract.

XLIII

Had the railroad barriers been removed, gravity drainage would have been feasible easterly, while the depth of the prism excavated remained above the surface of the water of the Genesee river. Gravity drainage would also have been feasible from the guard lock westerly into contract 6. But gravity drainage was not feasible easterly between the guard lock and the Genesee river below the surface of the water of the river.

XLIV

After contract 21 was terminated and on or about November 3, 1915, for the purpose of re-letting the contract for the completing of that part thereof which remained unperformed in contract 21, the engineer again made a preliminary estimate of quantities and cost in which he then estimated for coffer dams, pumping, bailing and draining per lump sum, \$15,000. At this time approximately 72 per cent of the work had been performed, leaving unfinished about 28 per cent. Based upon the testimony of the president of the claimant, his conversation with the engineers, the understanding that contract No. 6 would soon be available for drainage, the low sum estimated by the engineer for that purpose, I find as a fact that at the time of entering into contract No. 21, it was then the contemplation of the parties that gravity drainage would be available except as to that portion east of the guard lock.

XLV

All of the railroads herein above mentioned are engaged in part in interstate commerce and to that extent are acting under the jurisdiction of Congress.

XLVI

The above mentioned railroads under the statute of our State possess franchises giving them the right to operate their roads "along or upon any stream, water course, highway, plank road, turnpike or *across any of the canals of the State which the route of their roads shall intersect or touch.*"

XLVII

It was not the intention of the Legislature in passing the Barge Canal Act, nor was it the intention of the State officers in entering into contract 21 that the claimant should obstruct or interfere with the rights of the railroads in question to cross the canal.

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XLVIII

Under another provision of the statute "new bridges shall be built over the canal to take the place of existing bridges wherever required or *rendered necessary by the new location of the canal.*" The point of intersection of the above mentioned railroads with the canal is upon that part thereof which is a new location of the canal and bridges at such points are rendered necessary.

XLIX

Under another provision of the statute all of the work authorized by the act in constructing the canal "shall be done by contract." The construction of the new bridges upon the new location of the canal rendered necessary is a part of the work authorized by the statute for which contract for the construction thereof could be made.

L

No contract was made by the State officers for the construction of railroad bridges upon contract 21 until after the termination of the contract except that which was made with the Buffalo, Rochester and Pittsburgh Railway Company.

LI

The neglect of the State to cause the railroad bridges to be erected and installed at the site of their respective rights-of-way on or before the 1st day of January, 1911, so that the claimant could excavate thereunder, was in the nature of a breach of the contract on the part of the State from which the claimant suffered damages.

LII

The neglect of the State to cause the barriers of the railroad companies across the canal to be removed, deprived the claimant of gravity drainage, and compelled it to install and maintain pumps for the discharge of the water accumulating in the prism of the canal excavated for which it suffered damages on account thereof in the sum of \$27,300.

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LIII

Shovel Shifts

The number of shovel shifts for the years 1911, 1912 and 1913 was 1,716.

The crews actually employed..... 5,148

Pitmen actually employed..... 18,644

Total 23,792

With the railroad barriers removed
the necessary crew would have been

the same 5,148

Pitmen estimated 6 men per shift.. 10,296

Total 15,444

Which deducted from the above leaves excess pit-
men

8,348

Rate per shift \$1.75, making a total of \$14,609 as the amount of damages suffered by the claimant by reason of the breach of the contract aforesaid.

LIV

Dump Costs

Number of shifts for years 1911, 1912 and 1913 was 1,716.

Foremen actually employed 1,628

Laborers actually employed 26,832

Total 28,460

Had the barriers been removed the number of men necessary to have done the work would have been:

Foremen (same as above) 1,628

Laborers for 1,716 shifts (10 men per shift).... 17,160

Total 18,788

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Deducted from 28,460 leaves 9,672 excess laborers.

Rate of pay per shift \$1.60, which would amount to \$15,475.20 damages suffered by the claimant by reason of the aforesaid breach of the contract.

LV

Track Labor Cost

The number of shifts for the years 1911, 1912 and 1913 was 1,716.

Foremen actually employed	1,632
Laborers actually employed	24,806
	<hr/>
Total	26,438
	<hr/> <hr/>

The amount necessary if barriers had been removed would have been:

Foremen, same as above	1,632
Laborers, 10 men per shift, estimated	17,160
	<hr/>
Total	18,792
	<hr/> <hr/>

Deducted from 26,438 leaves 7,646 excess laborers. Rate of pay per man per shift \$1.60, \$12,233.60, the amount of damages suffered by the claimant by reason of the aforesaid breach of the contract.

LVI

Drilling and Blasting

During the years 1910, 1911, 1912 and 1913, as stated in claimant's brief, there were:

1,155 shifts in the drilling and blasting,	
6,286 runners at \$2.75	\$17,306 50
1,155 foremen at \$4.25 each	4,908 75
11,207 laborers at \$1.70	19,051 90
	<hr/>
Total for drill labor	\$41,267 15

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Fuel and oil, 1,155 shifts at \$8 per shift	\$9,240 00	
Blacksmith and helper, 1,155 shifts at \$6 per shift	6,930 00	
Hose, steel and repairs of drills, 1,155 shifts at \$14	16,170 00	
	<hr/>	\$32,340 00
Total drill cost		\$73,607 15

Springing and Loading

Six hundred and ninety-nine shifts:		
Foremen, 699 at \$4 each	\$2,796 00	
Laborers, 5,068 at \$1.60	8,108 80	
	<hr/>	
Total spring and loading		10,904 80
Cost of dynamite and explosives		81,857 21
		<hr/>
Total cost of drilling and blasting, as claimed by the contractor		\$166,369 16

The following corrections should be made:

The expenditures for drilling and blasting during the year 1910 were approximately one-thirtieth of the entire expenditure, which would amount to the sum of \$5,545.64, which deducted from the total cost, \$166,369.16, leaves a total expenditure for the years 1911, 1912 and 1913 of \$160,823.52.

Had it not been for the barriers and the delays caused by water, the work could have been done as follows:

Drilling at seven cents per cubic yard, 508,500 . .	\$35,595 00
Loading at one and one-half cents per cubic yard	7,627 50
Explosives at ten cents per cubic yard	50,850 00
	<hr/>
Total	\$94,072 50

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The fuel, oil, blacksmith and repairs of the steels and drillers amounting to \$32,340, remains the same and should be added to the necessary cost as above stated, making the sum of \$126,412.50.

This sum, however, includes the cost for the entire period of the contract, and, in order to eliminate the work done in 1910, one-thirtieth of that sum, amounting to \$4,213.75, should be deducted, which leaves \$122,198.75.

Deducting this amount from the total cost paid leaves \$38,624.77 as the amount of the damages suffered by the claimant during the years 1911, 1912 and 1913.

LVII

Delays occurred during the years 1911, 1912 and 1913 in the performance of the work under the contract in consequence of the neglect of the State in failing to cause the barriers to be removed which amounted to three and a half months. The overhead expenses of the claimant chargeable to contract No. 21 for that period amounted to \$3,445.61.

LVIII

The contractor insured the laborers employed by it, paying therefor the premium of \$3 per \$100 in amount. The laborers employed by the contractor in excess of that which was necessary amounts to \$49,945.30; which at \$3 per \$100 amounts to \$1,498.35.

LIX

The contractor caused to be manufactured and delivered on the site of the contract pursuant to the requirements thereof twenty-eight cast iron snubbing posts of the value of \$420.

LX

At the termination of the contract the claimant left upon the site crushed stone designed for the manufacture of concrete to be used upon the work of the value of \$720.

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CONCLUSIONS OF LAW

I

On the 18th day of May, 1910, the State of New York appropriated for canal purposes, pursuant to statute, the lands underneath the rails of the New York Central and Hudson River Railroad Company within the site of contract No. 21.

II

On the 28th day of May, 1910, the State of New York appropriated for canal purposes, pursuant to statute, the lands underneath the rails of the Buffalo, Rochester and Pittsburgh Railway Company within the site of contract No. 21.

III

On the 24th day of May, 1910, the State of New York appropriated for canal purposes, pursuant to statute, the lands beneath the rails of the Genesee Valley Terminal Railroad Company which had been leased to the Western New York and Pennsylvania Railway Company, and subsequently leased to the Pennsylvania Railroad Company, which at that time was operating the same, as lessee, within the site of contract No. 21.

IV

At the time of the execution of contract 21 the State held title in fee to the lands comprised within the Genesee Valley canal occupied by the tracks of the Western New York and Pennsylvania Railway Company and operated by the Pennsylvania Railroad Company as lessee, a corporation organized and existing under the laws of the State of Pennsylvania, at the point where the site of contract 21 crosses the same; that the State through the Superintendent of Public Works on the 30th day of September, 1881, granted a permit or license to the Genesee Valley Canal Railroad Company (of which the Western New York and Pennsylvania Railway Company was lessee) to lay its track in the bed of the Genesee Valley canal, "reserving, however, to the

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State of New York such right of re-entry and re-occupancy on the part of the State as the free and perfect use of the canals of the State of New York may at any future time require," which license was revoked in so far as the land was necessary for the barge canal in contract 21, May 2, 1910.

V

Under the provisions of the statute the above mentioned railroads possessed franchises which entitled them to operate their respective roads along or upon any stream, water course, highway, plank road, turnpike, or *across any of the canals of the State which the route of their roads shall intersect*. The appropriation made by the State above mentioned, of lands under railroad tracks, is subject to the right of such railroads to cross the canal.

VI

Under chapter 147, Laws of 1903, "all the work authorized by the act shall be done by contract." And, "new bridges shall be built over the canal to take the place of existing bridges wherever required or rendered necessary by the new location of the canals." Contract 21 being a part of the new location of the canal, bridges at the points of the intersection of the railroads crossing the same, were necessary and therefore it became the duty of the State and its duly authorized officers to let contracts for the construction of such bridges.

VII

At the time the contractor entered into contract No. 21 the State had made no contract for the construction of the bridges, but it was stated in the contract that it was expected that the bridges would be constructed by the railroad companies. It therefore became the duty of the State to proceed with reasonable dispatch in the making of contracts and causing the bridges to be constructed within a reasonable time. Such reasonable time was eight months or on or before the 1st of January, 1911.

VIII

The contractor in entering into the contract had notice through its own inspection of the existence of the barriers caused by the railroad crossings of the canal, as well as by the provisions of the contract, and, consequently, it cannot recover damages suffered by reason thereof until the expiration of such reasonable time required for the construction and installation of the bridges.

IX

After the 1st day of January, 1911, the State became liable to the contractor in damages for the delays resulting and the increased cost incurred by reason of the neglect of the State to put the claimant in possession of the whole contract site and afford the claimant free and unrestricted access beneath the tracks of the afore-mentioned railroad companies.

X

The State failed to enter into any contract for the construction of the railroad bridges over the canal during the lifetime of its contract with the claimant with the exception of the contract entered into by and with the Buffalo, Rochester and Pittsburgh Railway Company mentioned in the findings.

XI

By reason of the failure of the State to cause the railroad bridges to be constructed, the contractor was deprived of the right to enter upon and excavate the lands underneath the railroad tracks; was prevented from having free access through under such railroads to pass its engines, rails, ties and shovels, by which it suffered delays and additional expense in doing the work under the contract and it also deprived the contractor of the power to install gravity drainage.

XII

Under the provisions of the contract in case the State shall not have acquired possession of the lands within the contract site

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when the contractor is ready to begin actual operation, the time for the completion of the contract shall be deemed extended for a period equal to the time of the actual delay caused thereby. In view of the fact that such possession was not obtained during the life of the contract, it will be deemed to have been automatically extended from the 1st day of May, 1913, the time when by its terms the contract was to be completed, until the 30th day of September, 1913, the date that it was actually terminated.

XIII

At the time of entering into the contract No. 21, it was the contemplation of the parties that gravity drainage would be available, but owing to the neglect of the State with reference to the removal of the barriers, the claimant was compelled to install pumps and operate the same at additional expense in order to remove the water accumulating in the excavated portions of the canal. That the amount of such expenditures over and above the proportion of the lump sum paid after the 1st day of January, 1911, was the sum of \$27,300, which sum is a proper charge against the State, and the claimant should have judgment therefor.

XIV

That by reason of the failure of the State to remove the barriers, numerous shifts and back movements of the shovels were necessitated during the years 1911, 1912 and 1913, and an excess number of pitmen were required in order to do the work. That the excess number of pitmen required was 8,348 who were paid at the rate of \$1.75 per shift, making a total sum of \$14,609, which is a proper item of damages chargeable against the State, and judgment should be awarded therefor.

XV

That owing to the neglect on the part of the State to cause the railroad barriers to be removed, it became necessary for the claimant to employ an excess number of laborers to do the dumping which during the period of the three years above named amounted

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to 9,672 at \$1.60 per man per shift, making a total of \$15,475.20, which sum is a proper item of damages chargeable against the State, and judgment should be awarded therefor.

XVI

Owing to the neglect of the State aforesaid, the contractor was compelled to employ an excess number of laborers to remove and relay the tracks, amounting during the three years named to 7,646 men at the rate of \$1.60 per man per shift, making a total of \$12,233.60, which sum becomes a proper item of damages chargeable against the State, and judgment should be awarded therefor.

XVII

By reason of the neglect of the State before mentioned the contractor was compelled to employ a greater number of men to do the drilling and blasting during the three years aforesaid than would have been required had the barriers been removed and also suffered the destruction of a considerable quantity of explosives by reason of the presence of water at the time of blasting, which additional expense for labor and for dynamite amounted in the aggregate to \$38,624.77, which sum becomes a proper item of damages chargeable against the State, and damages should be awarded therefor.

XVIII

Owing to the delays caused by the neglect of the State as aforesaid, the claimant suffered delays to the extent of three and a half months for which the overhead expenses of the claimant amounted to the sum of \$3,445.61, which sum becomes a proper item of damages chargeable against the State, and judgment should be awarded therefor.

XIX

By reason of the failure of the State aforesaid, the contractor was compelled to pay premium on the insurance of the men whose services were in excess of that which otherwise would have been required. That such service for the years 1911, 1912 and 1913 amounted to \$49,945.30, with a premium of \$3 per \$100 amount-

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ing to the sum of \$1,498.35, which becomes a proper item of damage chargeable against the State, and judgment should be awarded therefor.

XX

Upon the termination of the contract the claimant had manufactured and shipped to the contract site twenty-eight snubbing posts of the value of \$420. This sum becomes a proper item of damages chargeable against the State, and judgment should be awarded therefor.

XXI

At the termination of the contract the contractor left upon the site a pile of crushed stone which was valued at \$720. This sum becomes a proper item of damages chargeable against the State, and judgment should be awarded therefor.

XXII

The following claims are disallowed:

For use of plant	\$54,420 00
Lost plant capacity, 330,000 cubic yards at forty-eight and one-half cents minimum	160,050 00
Paid Pennsylvania Railroad	1,650 00
Interest on money retained	5,546 75

Making a total of	\$221,666 75
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SUMMARY

Increased cost of pumps, etc.	\$27,300 00
Increased cost of shovel labor	14,609 00
Increased cost of dump labor	15,475 20
Increased cost of track labor	12,233 60
Increased cost of drilling and blasting	38,624 77
Overhead expense	3,445 61
Insurance for excess of laborers	1,498 35
Snubbing posts	420 00
Crushed stone	720 00

Total	\$114,326 53
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Let judgment be entered in favor of the claimant, the Lane Brothers Company, against the State of New York for the items aforesaid amounting to the sum of \$114,326.53.

Attached hereto is an opinion prepared by me which in so far as it discusses the legal questions involved may be considered as a part of this report.

All of which is respectfully submitted.

ALBERT HAIGHT,
Referee.

REFEREE'S OPINION.

HAIGHT, Referee.—On the 7th day of April, 1910, the claimant herein, a corporation, entered into a contract with the State of New York for the excavation of that part of the canal prism of the improved Barge canal extending from the Genesee river on the east to the east end of contract No. 6 on the west, approximately two and forty-three one-hundredths miles, and including the construction of a guard lock and abutments for highway bridges at the points where the canal crosses the Scottsville, Brooks avenue and Chili roads. The contract, plans and specifications are known as contract No. 21.

Under the provisions of the contract the claimant agreed to commence work on the contract on or before the 1st day of May, 1910, and to progress therewith to its completion on or before May 1, 1913. It agreed to furnish all the work, labor, services and materials of every kind and to perform each and every act and thing necessary or proper for the improvement of the canal by excavating the prism and constructing the guard lock and abutments for the highway bridges, and all appertaining work, between the Genesee river and the east end of contract No. 6 in accordance with the plans and specifications annexed and made a part of the contract and to fully complete the improvements in accordance with the true intent and meaning of such plans and specifications. The territory embraced in the contract is a part of the new route established for the Barge canal for the purpose of making a crossing of the Genesee river above the city of Rochester. The new route crosses the main line of the New York Central and Hudson River Railroad Company's right-of-

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way and tracks, the Buffalo, Rochester and Pittsburgh Railway right-of-way and tracks, the Pennsylvania Terminal right-of-way and tracks, and also those of the Pennsylvania Main Line Railroad constructed upon the site of the former Genesee Valley canal.

Under the provisions of the contract the claimant was required to so conduct its work as not to interfere with the railway traffic. Then follows the provision in which it is stated: "It is expected that the masonry abutments and the superstructure necessary to carry the railroads over the canal prism together with so much of the excavation and backfilling as may be necessary therefor will be carried out by the railroad companies. The contractor shall extend all excavation, backfilling and other work that may be necessary to make proper junction with the work of the railroad companies and to complete the canal prism as indicated on the drawings."

It appears from the evidence that the railroad companies, except the Buffalo, Rochester and Pittsburgh Company, neglected and refused to construct the masonry abutments or to construct the bridges necessary to convey the railroad tracks over the canal prism and the railroads refused to allow the contractor to excavate underneath their tracks or so near thereto as to endanger their traffic over such tracks. It further appears that the contractor orally and in writing on numerous occasions complained to the engineers in charge, alleging that the company was suffering damages by reason of delays occasioned in not being able to excavate under the railroads or to drain the water accumulating in the excavations through the embankment underneath such tracks. It further appears that neither the State Engineer, the Superintendent of Public Works nor the Canal Board reached any agreement with the railroad companies with reference to construction of bridges over the prism of the proposed canal and consequently they did not direct the contractor to take possession of or excavate the earth underneath such railroad tracks. The contractor, however, did, after the lapse of some considerable time, enter into an agreement with the Buffalo, Rochester and Pittsburgh Railway Company to construct the abutments upon

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which a bridge was subsequently erected, but the bridge was not erected until near the termination of the contract. Under these circumstances, the contractor, on October 25, 1912, petitioned the State officers to cancel its contract and to relieve the company from further liability thereunder, but its application was refused on January 30, 1913, and the contractor thereupon proceeded with the work until the 16th day of August, 1913, at which time a further request to terminate the contract was made which resulted in a resolution of the Canal Board under date of September 30, 1913, terminating the contract, the claimant waiving all rights to any future profits that might result from the performance of the work under the contract but specifically reserving its claim against the State for any and all items of damage growing out of the alleged breach by the State of the said contract and out of all alleged failure or neglect of the State to provide the contractor with the site of the said contract as in and by the contract provided.

The total contract price for the entire work was \$1,323,150. The value of the work performed at the time of the closing of the contract was \$948,999.89 which was 71.7 per cent or approximately 72 per cent of the entire contract.

The contention of the claimant is to the effect that the State failed to put it in possession of the site of the contract beneath the railroad tracks, thereby preventing it from completing the contract in accordance with the terms thereof and consequently impeding, hindering and delaying the progress of the work and increasing the cost thereof.

On behalf of the State evidence was presented from which it is claimed that all of the provisions of section 4 of chapter 147 of the Laws of 1903 were complied with by which the State had appropriated the lands required for the canal prism under the railroad tracks and that the State or its contractor had the right to enter thereon and carry out the provisions of the contract. That with reference to the Pennsylvania Main Line, its tracks were upon the Genesee Valley canal. That the title thereof vested in the State and was occupied by the railroad company only under license which was revokable at any time when the State

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desired the same for canal purposes, and that in serving the notice of the map locating the canal, it operated to revoke the license and that, therefore, the contractor had the right to enter thereon and perform the work necessary to complete the contract.

The questions of law presented by the learned Attorney-General are as follows (quoting from his brief):

“ 1. Where the State has appropriated, pursuant to statute, the tracks and property of a railroad corporation crossing the site of the Barge canal contract, is a duty at law impressed upon the State to physically dispossess the railroad from the site of the work ?

“ 2. Where a railroad is operating on State land under a revokable license which contains a provision, ‘ reserving, however, to the State of New York such right of re-entry and re-occupancy on the part of the State as the free and perfect use of the canals of the State of New York may at any time require,’ will the location of the Barge canal by the State Engineer across said railroad, pursuant to statute, followed by statutory notice of the location of the point where the canal crosses such railroad constitute a revocation of the license under which the railroad is operating upon State lands ?

“ 3. What risks are assumed by a contractor who undertakes the construction work under a Barge canal contract ?”

The contractor has raised a number of questions with reference to the regularity of the proceedings by which the State claims to have appropriated the lands under the railroad tracks and also contends that the filing of a map with the notice thereof does not operate in law to revoke the license.

The railroad companies are not parties to these proceedings and no decision that I may here make will be binding upon them. Under the view taken by me it does not become necessary to enter upon a careful consideration or discussion of the questions raised with reference to the services of notices, etc., but for purposes of this case I am going to assume and find as a fact that the State by its proceedings in question had made a valid appropriation of the lands underneath the railroad tracks that was proposed to be occupied by the canal and that the license of the Pennsyl-

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vania Railroad Company in so far as it interfered with the construction of the Barge canal, was revoked. What then is the situation of the parties? On the one hand we have the State of New York engaged in the construction of a Barge canal through the State chiefly following the lines of the old Erie canal, but departing therefrom in a number of places for the purpose of improving and facilitating the transportation of property. In locating such new routes it has in the instance under consideration been compelled to cross the lines of several railroads as it lawfully had the right to do and condemn and take possession of such lands as were necessary for the purpose of its construction. On the other hand, we have four railroads extending through and across portions of the State whose location and use are as well known to the public as the location of our rivers and harbors; consequently we may take judicial notice of their location and use. They are all engaged in interstate commerce and the transportation of persons and property and the carrying of the United States mails, acting under the jurisdiction of Congress. Under the statute of our State the railroads have franchises giving them the right to operate their roads along or upon any stream, water course, highway, plank road, turnpike or *across any of the canals of the State which the route of their roads shall intersect or touch*. This right is clearly given by the statute and it was never the intention of the Legislature in passing the Barge Canal Act or of the State officers in entering into a contract with the claimant to construct the canal, to interfere with this right. *People ex rel. N. Y. C. & H. R. R. R. v. Walsh*, 211 N. Y. 90. On the contrary, we find a clause in the contract prohibiting the contractor from interfering with the traffic of the railroads, and in the statute we find an express provision requiring "new bridges shall be built over the canals to take the place of existing bridges wherever required, or *rendered necessary by the new location of the canal*." Here upon this contract we have a new location of the canal. It, as we have seen, crosses the railroads already referred to. It consequently follows that new bridges are necessary at such crossings, and under the recent decision of the Supreme Court and the Court of Appeals in the case of the Lehigh Valley Railroad Company against the Canal Board, it has been definitely

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settled that under the provision of the statute the new bridges must be built at the expense of the State. 204 N. Y. 471; 146 App. Div. 151; 29 Misc. Rep. 251. It being settled by the decision of the highest court of our State that the bridges must be built at the expense of the State, the question arises as to how or by whom they are to be constructed. The Attorney-General appears to entertain the view that the bridges must be constructed by the railroads; that the State has performed its full duty when it has appropriated the land. It appears to me that the duty of construction rests upon the party that is made liable to pay therefor. Undoubtedly the State may enter into a contract with the railroad companies to construct the bridges carrying their respective roads over the canal, at a price specified in the agreement the same as the State may agree with any other person or corporation to do the work. The building of the bridges is one of the incidents in the construction of the canal. It in effect becomes a part thereof as is evidenced from the fact that the engineers in making their estimate of the cost of the canal included therein the cost of the bridges as well.

In this connection a question arises as to how payment for the bridge is to be made. It is suggested on behalf of the State that the amount may be determined by the special examiner and appraiser created by the statute and in case the railroad companies in constructing the bridge should not be satisfied with the amount that the appraiser should determine, they may have recourse to the Board of Claims.

I suggest that under the statute as it then existed, that the intention was that the cost of construction of the bridges should be paid for in like manner as that of the construction of any other part of the canal, namely, as specified in the contract or by monthly estimates of the engineer audited and paid for by the Superintendent of Public Works out of the appropriation for canal construction as the work progressed. It is true that a different rule obtains under the proceedings to condemn lands for canal purposes. Under the provisions of the statute the State Engineer may, subject to certain conditions, enter upon, take possession of and use lands and structures and waters the appropriation of which is for the use of the improved canals or for the

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utilization and full control of the State of the waters impounded. Then follow the details necessary for the appropriation, the consent of the Canal Board, etc., and then the statute concludes, "From the time of the service of such notice, the entry upon and the appropriation by the State of the real property therein described for the purposes of the work and the improvement provided for by this act shall be deemed complete, and such notice so served shall be conclusive evidence of such entry and appropriation of the quantity and boundaries of the property appropriated." The right of entry and use of the lands so appropriated commences at the time of the service of the notice mentioned and thereupon if the owner is unable to agree with the special examiner as to the award that should be paid thereon, the statute gives to the Court of Claims jurisdiction to determine the amount of compensation that shall be allowed for such lands, etc. In such case, the land owner parts with the possession of his land and has to wait for the determination of the Court of Claims to fix the amount of his damages before getting his pay. He, however, is not required to perform any work or expend any money in the way of construction. In so far as the State has by these proceedings appropriated the land of the railroad companies, the railroad companies doubtless will have to wait until the special examiner or the Court of Claims determines the value of the property appropriated; but that the railroad companies should be compelled to advance and pay for the construction of expensive bridges over the canal and then wait for reimbursement until the Court of Claims determines the amount in a regular proceeding for that purpose does not appear to me to have been contemplated by the Legislature in the enactment of the statute. As I understand, the manner of payment above suggested is in accord with that which obtains with reference to the construction of new highway bridges over the existing and newly located canal. While I do not question but that payments may be legally made through the special examiner and the Court of Claims, my attention has been called to no statute that provides a different rule for the payment of the contractor for railroad bridges rendered necessary by such new location of the canal, than that which obtained with reference to highway bridges.

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Again, the State being obliged to pay for the bridges over the newly located canal, it would seem to follow that it should be heard with reference to the determination of the character and quality of the structure to be installed as well as the right to guard itself against exorbitant charges and expenses. If I am right with reference to the conclusion which I have reached, all of the rights of the State with regard to such structures may be recognized and guarded in its contract for the erection of such bridges.

I do not understand that the situation of the Pennsylvania railroad requires any different conclusion. Conceding that the title of the lands occupied by it is in the State, the railroad company still has the right to operate its trains across the canal the same as the other railroads. This right it cannot exercise unless a bridge is provided. This is the situation with reference to the other railroad companies and the same rule must obtain with reference to liability to construct and pay for the crossing.

My conclusions are that the contention of the learned Attorney-General cannot be sustained, and in answer to his claims I must state:

1. That while it is not the duty of the State to physically dispossess the railroads from the site of the canal, it is its duty to either contract with each railroad to build its own crossing, or to contract with some other person to construct one for it.

2. Conceding the license to be revoked and the title of the land occupied by the Pennsylvania Railroad Company to be in the State, the franchise of the railroad company with the right of the company to operate its trains across the canal survives, and therefore its situation is the same as that of the other railroads.

3. The contract in this case does not require the contractor to construct the abutments of any of the railroad bridges over the canal. On the contrary, it is prohibited from interfering with the traffic of the railroads. It could not, therefore, excavate the lands under the tracks until the crossing of the railroads over the canal had been constructed.

It consequently follows that the State within a reasonable time was obligated to provide the contractor with the sites of the rail-

road companies, in order that it might perform its contract in excavating the prism of the canal thereunder. This the State has failed to do and, therefore, it became liable to the claimant for a breach of contract for the damage it has sustained by reason of such failure.

An elaborate discussion appears in the brief of counsel as to whether the special deputy engineer had the power to appropriate on behalf of the State the lands under the railroad track. It will be borne in mind that the lands, so attempted to be appropriated are a part of the right-of-way of the new Barge canal which departs from the old Erie canal right-of-way and is being constructed around the city of Rochester; that this portion of the canal was laid out in accordance with the provisions of the Barge Canal Act, so-called, and approved by the Canal Board; that a contract has been let for the excavating of the canal prism upon such right-of-way, which has been executed in part. In the case of *Pratt v. State*, the same question was raised and in disposing of that case I then took occasion to state: "In the *Ontario Knitting Company Case v. State of New York*, 205 N. Y. 409-419, it was held that the power to appropriate the lands of private persons for the benefit of the canal involved judgment and discretion which under the statute was vested in the Engineer and not in a deputy appointed by him. In that case the plans for the improvement of the canal had been submitted to the Superintendent and to the Canal Board for their approval. They had been approved and the contract had been let for the performance of the work called for and partially performed when the Deputy Engineer filed a certificate appropriating the Ontario Knitting Mills thus completely changing the plans adopted by the Canal Board and necessitating a change of the work that was being done under the contract. The new plans of the Deputy Engineer were repudiated by the Canal Board and the property of the Knitting Mills was never taken over by the State. It was then held that the certificate was void and that it did not amount to an appropriation. A very different question is now presented. In this case the plans recommended have been approved by the Superintendent and the Canal Board, possession of the property

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has been actually taken; the contract for the improvement under the plans adopted has been let and the work thereunder principally performed. I, therefore, conclude that notwithstanding the fact that the Deputy Engineer exceeded his authority in signing the certificates, still the appropriation was authorized and his acts have been ratified and confirmed by the State in the taking possession of the parcels appropriated."

The Pratt case has been recently affirmed by the Court of Appeals and consequently must be regarded as disposing of the question raised in this case; the facts being similar to those considered in that case. (219 N. Y. 554 and 635.)

A contention arose between the parties upon the trial as to whether gravity drainage could be made into the prism of the canal which was excavated under contract No. 6, the contention of the State being to the effect that inasmuch as the contract for that part of the canal was not completed until September, 1911, drainage therein was not practical until that time. Even if that be conceded, it does not change the fact that at the time the contract was executed, it was contemplated by the parties thereto that gravity drainage should be provided and that such drainage was not provided by the State within the reasonable time already determined. For that reason I have held that it became necessary for the contractor to install pumps along the entire contract in order to take care of the inflowing water and have awarded as damages therefor all that the claimant asked for.

It is apparent that the claimant suffered considerably from the presence of water. It may be that the pumps which it installed were not sufficient to take care of the water at all times. But it must be borne in mind that in that section of our State veins of water flowing through the earth are very common and the evidence on the part of the claimant in this case is to the effect that the springs were very numerous. It also is common knowledge that in the dryer seasons of the year the earth at the surface is ordinarily dry and may be easily handled by shovel and that in excavating downward from fifteen to twenty feet, usually water will be encountered and from that point downward the earth as excavated will be damp and more difficult to shovel and

dump from the cars; that at times heavy rain storms occur in which large quantities of water flow over the surface into the prism of the canal, as expressed on behalf of the claimant, "drowning out the men at work therein." These conditions are but natural and the State has no control over them. It is true that with the gravity drainage the floods may more rapidly flow away and restore usual conditions than could be done through the pumps, but gravity drainage has its drawbacks for it keeps the earth over which the water flows soaked, and each shovel, in excavating therein, will not only be filled with mud, but will create a new and lower level for the drain. In making the following estimates I have taken into consideration all of the conditions herein referred to and the causes producing the same and have exercised my best judgment upon the evidence produced before me.

Whether the contractor upon contract No. 21 had entered into a valid contract with the contractor constructing No. 6 I do not deem it necessary to now determine. The Barge canal contracts contain provisions that adjoining contractors shall afford to each other all the facilities practical in the performance of their work. The fact that the State had extended the time for the completion of contract No. 6 does not relieve it of its obligation to provide for the construction of the bridge over the canal at the point of the intersection thereof of the New York Central tracks. Had the barrier created by the New York Central tracks been removed, then it might have been possible for the contractor to make some arrangements with the contractor on No. 6 for the drainage of the water from contract No. 21. In any event, after the completion of contract No. 6 in September, 1911, there could have been no possible reason why drainage into contract No. 6 should not have been made and that with the consent of the engineer who contemplated gravity drainage in his original preliminary estimate upon that subject.

DAMAGES

The claimant presents two methods for the ascertaining and determining the amount of damages that it has suffered. One

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claim is that had the State supplied the contractor the access under the railroad tracks it could have completed the entire contract by the 15th of May, 1912; that after that time it was compelled to continue the work upon the contract for fifteen months at an expense of	\$242,213 62
Loss of plant capacity	160,050 00
Overhead	14,766 87
Interest on retained percentage	5,546 75
Plant rental	54,420 00

Making a total of	\$476,997 24
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The other method presented is itemized as follows:

Increased cost of shovel labor	\$25,490 50
Increased cost of dump labor	27,945 60
Increased cost of track labor	23,027 20
Increased cost of pump and sump labor and power	27,300 00
Increased cost of drilling and blasting	90,094 16
Overhead expenses, fifteen months	14,766 87
Increased cost of insurance on labor, etc., three dollars per 100	3,172 58
Lost use of plant or rental fifteen months	54,420 00
Lost plant capacity 330,000 cubic yards, at forty-eight and one-half cents per minimum	160,050 00
Paid Pennsylvania Railroad	1,650 00
Snubbing posts	420 00
Crushing stone	720 00
Interest on money retained	5,546 75

Total	\$434,603 66
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The damages are not ascertainable to a mathematical certainty under either of these methods. The contractor has supplied us with accounts of the actual expenses incurred and paid for, together with the amount of work accomplished upon the contract down to the time of its termination which is substan-

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tially without dispute and has been paid for by the State. We are also supplied with evidence bearing upon the question of delays, the causes of delays and an estimate that were it not for such delays the contract could have been completed by the 15th of May, 1912. The delays of the contractor upon the work were owing to various causes, some of which may have resulted from the neglect of the State to furnish the contractor with the sites for excavation, occupied by the railroad companies, and some resulting from causes for which the State was in no wise responsible and in numerous cases such delays occurred by reason of a combination of such causes thus forcing an entrance into the field of estimation.

We are told that the contractor tested each of his shovels as to the amount of cubic yards of earth it could excavate during a shift of eight hours and that ten such tests were made from which it appeared that the capacity of the four shovels was 7,200 cubic yards per shift. We are also told of the tests made in Virginia in the excavating of rock and that the capacity of the four shovels in rock is 3,200 cubic yards per shift. The amount of earth excavated at the termination of the contract, September 30, 1913, was 1,252,513 cubic feet and the amount of rock was 508,500 cubic feet. It would therefore take 174 shifts of the four shovels to excavate the earth and 159 shifts of the four shovels to excavate the rock, or 1,333 single shifts. This carried out it is estimated would result in excavating the amount of earth and rock required upon the contract by the 15th of May, 1912. It will readily be seen that much depends upon the time, place and circumstances under which the test is made. If it was made at the beginning of the work we have a territory extending two miles and nearly a half through a country ascending slightly from the Genesee river up to Brooks avenue and then descending to the western end of the contract, making a surface variation of only twenty or thirty feet in the entire distance. Through this territory is being excavated a canal whose base is to be approximately eight feet below the ordinary level of the water of the Genesee river, while in some places the cut is upwards of fifty feet in depth. If the tests were made at the beginning of the work when

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the shovels were on top of the ground and the spoil was to be dumped upon the adjoining ground, it is quite apparent that the work could progress with much greater speed than that which had to be raised from the excavation from twenty to fifty feet below, which had to be loaded upon cars, drawn up an incline on to the spoil banks and dumped. In other words, the delay and length of time in doing the work necessarily increased as the excavation progressed downward and the spoil banks upward, thus making the time, labor and expense of excavating a yard of earth from the bottom of a trench fifty feet deep much greater than the excavating of a yard upon the surface. For the purpose of testing the claimant's estimate of 7,200 cubic yards per shift, I have selected the months of July, August, September and October, 1910, which include the driest and most favorable months for shovel work and embracing the time when the shovel work was beginning upon the surface of the ground and the dumps could be most rapidly and economically handled, and I find that during the month of July the average amount excavated per shovel was 837 cubic yards. During the month of August the amount per shovel averaged 1,080 cubic yards; during the month of September the average per shovel was 901 cubic yards and during the month of October the average was 1,080. Of course, as I have already shown, as the excavation of the prism grew deeper the labor and expense necessarily increased, and during the months of December, January, February and March but small amounts of earth were excavated doubtless owing in part to weather conditions. These facts lead me to doubt the accuracy of the claimant's estimate as to 7,200 cubic yards per shift of the four shovels or that it was possible to keep up such an amount of excavation during the winter months of the year, and I am, therefore, not willing to adopt the claimant's contention that the work could have been performed by it by the 15th of May, 1912.

I, therefore, proceed to consider claimant's second method of estimating the damages.

Under the provisions of the contract, as I have already shown, the State expected that the railroad companies would construct the bridges over the canal, but this the companies failed to do.

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It, therefore, becomes the duty of the State to either construct the bridges or let contracts therefor. This should have been done within a reasonable time, in view of the fact that the contract for the excavating of the canal had been let and the contractor was then at work upon the same. I am of the opinion, and consequently find as a fact, that the reasonable time for the construction of detour tracks, excavating and construction of the abutments and the fabrication and installation of the bridges was eight months, or on or before January 1, 1911.

The contractor in entering into the contract had notice, through its own inspection, as well as by the provisions of the contract, of the existence of the barrier caused by the railroads crossing the canal, and consequently it is not in a position to recover damages suffered by reason thereof until the expiration of such reasonable time required for the installation of the bridges, but under the view entertained by me, after the expiration of that time it has the right to recover the damages suffered on account of the delays and extra work necessary to be performed and extra expenses incurred in consequence of the existence of such barriers.

COFFER DAMS, PUMPING, BAILING AND DRAINING

In contract No. 21 the engineer's preliminary estimate of coffer dams, pumping, bailing and draining was a lump sum of \$4,000. Under the provisions of the statute the Superintendent of Public Works cannot award a contract when the total of the bid to be considered is more than 10 per cent in excess of any item as estimated by engineer's estimate of the work to be done; or, if any item of the bid is more than 20 per cent in excess of any item as estimated by the engineer, excepting with the approval of the State Engineer and Surveyor and the Canal Board. The bid of the claimant accordingly for this item was the same as that estimated by the engineer. Under subdivision 10 of the contract it is provided that, "the contractor agrees that he has satisfied himself by his own investigation and research regarding all the conditions affecting the work to be done and labor and material needed and that his conclusion to execute this

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contract is based on such investigation and research and not on the estimate of the quantities or the information prepared by the State Engineer and that he shall make no claim against the State because any of the estimates, tests or representations of any kind, made by any officer or agent of the State may prove to be in any respect erroneous."

It is claimed on behalf of the State that notwithstanding there may be a breach of the contract with reference to the procuring the contractor with the possession of the lands under the railroads for excavation, that no damages can be awarded under the above provision of the contract for the reason that the water conditions affecting the work and the presence of the railroads upon the site of the contract were conditions assumed by the claimant when the contract was entered into and their existence cannot constitute a breach of any duty by the State under the terms of the contract; while on behalf of the claimant it is contended that in letting the contract and in entering into it by the contractor, it was understood that the contractor should have gravity drainage in excavating the lands under the contract; that it was deprived of such drainage at either end of the contract by reason of the New York Central railroad crossing at the western end of the contract adjoining that of contract No. 6 and at the eastern end by reason of the Pennsylvania railroad crossing preventing drainage into the Genesee river. Mr. Lane, the president of the contractor corporation, in substance so testified. At that time contract No. 6 was approaching completion and its time limitation was about to expire. That in that section of the canal known as contract No. 6 an opening had been constructed into a culvert by which the water could be drained from the canal into a small ravine or brook which it was then understood would soon be available for gravity drainage of contract No. 21. In addition to that there is the fact already alluded to that the State caused to be entered in the contract the provision that it was expected that the railroad companies would construct the abutments and the bridges over the canal. There is still another item of evidence which may have some bearing upon the question under consideration. During the trial the claimant offered in evidence another

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contract made between the State and the Walsh Construction Company of Davenport, Ia., known as contract 21-A, for the completion of the work that remained unperformed under contract 21 when the contract with the Lane Brothers Company was terminated by the resolution of the Canal Board, except that which was still occupied by the railroad companies underneath their contracts. This contract was received in evidence, I reserving the right to consider its materiality in the final determination of the case. The only part of the contract which I consider material is the engineer's preliminary estimate attached thereto, made November 5, 1915, and that only as to the inference to be drawn therefrom. In that estimate he allows a lump sum for coffer dams, pumping, bailing and draining of \$15,000. At this time, as we have seen, approximately 72 per cent of the work under contract had been performed, leaving only 28 per cent, including that under the railroad tracks, unperformed; yet, in making his estimate in November, 1909, he only allowed the sum of \$4,000 for the coffer dams, pumping, bailing and draining of the entire territory embraced in contract No. 21. If \$15,000 is the proper estimate for the coffer dams, pumping, bailing and draining of 28 per cent of the contract, it would seem to follow that the proper sum for coffer dams, pumping, bailing and draining of 72 per cent would be \$38,571. No question is raised with reference to the honesty of the engineer in the estimates made, but the *inference* to be drawn from the difference between the two estimates is the tendency to support the contention of the claimant that the \$4,000 estimate made in 1909 was based upon the understanding that gravity drainage would be afforded the contractor in the manner claimed by him.

Under the provisions of the contract the contractor was precluded from excavating through to the Genesee river until he had excavated the prism of the canal west of the Scottsville road and constructed the guard gate therein so that the water of the river could not flow back into the canal and flood the same. This provision would necessitate the establishing of a pumping station near the river end of the canal and the maintaining of it until that portion could be excavated down to the river. It also

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included the cost of constructing the coffer dam at the entrance of the river. This would necessitate the expenditure of about the lump sum embraced in the engineer's estimate, thus presenting an argument in favor of claimant's contention that gravity drainage was understood and contemplated by the parties. I am inclined to so find the facts.

The claimant has given evidence showing the amount expended by it for pumping and draining, including labor and power, to be \$33,000. This includes items of insurance of men		\$322 41
Instalment of pumps	1,750 00
Overhead	1,472 36
Use or rent of plant	4,500 00
Total		<u>\$8,044 77</u>

Under the provisions of the contract the furnishing and installing of the plant necessary to do the work is a duty devolving upon the contractor and he is presumed to have made his bid large enough to reimburse himself out of the profits for the above item of expenditures, but in view of the fact that these expenditures were not contemplated by the contract for a lump sum and would not have been necessary if gravity drainage had been provided, I have concluded to include the items. The labor performed upon the contract for pumping and sumps amounted to \$10,747. The amount of labor performed during the year 1910 was approximately one-sixth of that amount, being \$1,791. To that amount there should be added the amount paid on contract lump sum \$2,860, making \$4,631, which deducted from \$33,000 leaves a greater sum than claimed.

It is true that the expectation of the State that the railroads would construct the bridges across the canal was not fulfilled. It is also true that the contract No. 6 was not completed within the time limits and that the State granted the contractor additional time to complete the same and that it was not fully completed until September 15, 1911. It consequently followed that the

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contractor of No. 21 was compelled to install pumps in sumps at other places along the canal and to operate the same, which it did, at an expense over and above that provided for the contract of the amount claimed, \$27,300. I, therefore, allow that sum as an item of damages in the case.

SHOVEL COSTS

The shovels in making the excavation had to operate between the embankments caused by the crossing of the different railroads, and were compelled on approaching the railroad embankment to back up to the starting point. It is claimed that the earth was wet, would stick to the shovel, and occasionally they were flooded out, thereby occasioning delay and extra labor. The claimant's attorney in his brief states:

"Number of shifts.....	2,198	
		<hr/>
Crew employed, actual.....	6,594	
Pitmen, actual	23,358	
		<hr/>
Total crew and pitmen, actual.....	29,952	
		<i>Usual</i>
"Crew (same as actual).....	6,594	
Shifts at 4 men, pitmen.....	8,792	
		<hr/>
Total crew and pitmen, usual.....	15,386	
		<hr/>
Excess pitmen	14,566	
		<hr/>

"Rate per shift, \$1.75.

"Damages of increased cost, \$25,490.50."

It will be observed that the portion of the claim marked "actual" is the amount of shifts and pitmen actually employed upon the contract and is shown by the claimant's Exhibit 77. There is a slight difference between the evidence submitted on behalf of the claimant from that of the State, but owing to the fact that the State in its evidence had not included the work per-

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formed on Sundays, I regard the difference as slight and have adopted the claimant's figures upon that subject. But it will be also observed that the portion of the claim marked "usual" is the claimant's estimate of the number of pitmen that would have been sufficient to do the work had not the contractor been delayed by the existing railroad barriers. This estimate I think is too low. The amount is not capable of accurate determination by figures taken from the evidence and can only be approximated by taking into consideration the labor that was actually employed in doing the work, and considering the delays by back movements, the presence of water and other events that occurred with the number of men that were employed in such back movements, etc., during such delays, and in that way approximate the actual number of men that would have been required to do the work had such delays not occurred. The result that I have reached is that it would have required approximately six men per shift. The entire claim is erroneous for the reason that it includes the time that the work progressed during 1910, that time being within the reasonable time during which the State had the right to cause the bridges to be installed over the canal. The claim, therefore, I have amended as follows: The number of shifts for 1911, 1912 and 1913, as shown by Exhibit 77 is 1,716.

Crews actually employed	5,148
Pitmen actually employed	18,644
	<hr/>
Total	23,792

With Railroad Barriers Removed

Crew	5,148
Pitmen, estimated 6 men per shift..	10,296
	<hr/>
Total	15,444
Number of excess pitmen	8,348
Rate per shift	\$1.75
	<hr/>
Total	\$14,609 00
	<hr/> <hr/>

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DUMP COSTS

The claim as stated under claimant's Exhibit 78 and State's Exhibit V should be amended in accordance with suggestions already made and is stated by me as follows:

Number of shifts for years 1911, 1912, 1913....	1,716
Foremen actually employed	1,628
Laborers actually employed.....	26,832
Total	28,460

Necessary if Barriers Had Been Removed

Foremen	1,628
Laborers for 1,716 shifts at ten men per shift	17,160
	18,788
Excess of labor	9,672
Rate of pay for man shift, \$1.60.....	\$15,475.20

TRACK LABOR COST

(Claimant's Exhibit 79, State's Exhibit " V ")

Number of shifts, years 1911, 1912, 1913.....	1,716
Foremen actually employed	1,632
Laborers actually employed.....	24,806
	26,438

Necessary if Barriers Were Removed

Foremen	1,632
Laborers, 1,716 shifts at ten men per shift, estimated	17,160
	18,792
Excess labor	7,646
Rate per man shift, \$1.60, total	12,233 60

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DRILLING AND BLASTING

(As reported in claimant's brief.)

Number of shifts	1,155
6,286 runners at \$2.75	\$17,306 50
1,155 foremen at \$4.25	4,908 75
11,207 laborers at \$1.70	19,051 90
Total drill labor	\$41,267 15
Fuel and oil, 1,155 shifts at \$8	9,240 00
Blacksmith and helpers, 1,155 shifts at \$6	6,930 00
Hose, steel and repairs, 1,155 shifts at \$14	16,170 00
Total drill cost	\$73,607 15

SPRINGING AND LOADING

Number of shifts	699
Foremen, 699 at \$4	\$2,796 00
Laborers, 5,068 at \$1.60	8,108 80
Total springing and loading	\$10,904 80
Net cost dynamite and exploders	81,857 21

SUMMARY

Drilling — labor, fuel and supplies	\$73,607 15
Springing and loading — labor	10,904 80
Explosives	81,857 21
Total	\$166,369 16
Cost per cubic yard rock under normal conditions.	
Drilling06
Loading01
Explosives08
Total	\$.15 per cu. yd.
508,500 cu. yds. rock	
508,500 cubic yards at \$.15	76,275 00
Damage, increased cost	\$90,094 16

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The first correction that I wish to make to the claimant's figures is the elimination of the year 1910. In that year there was expended in drilling the sum of \$1,429.70 which approximately is one-thirtieth of the entire expenditure for drilling. Applying this ratio to the other expenditures, it would amount to \$5,545.64, which deducted from the total expenditures would leave \$160,823.52 as the expenditure for drilling and blasting during the years 1911, 1912 and 1913. The amounts which the claimant allows for the performance of the work under normal conditions, first for drilling, six cents per cubic yard, amounting to \$30,510 00 Loading at one cent per cubic yard. 5,085 00 Explosives at eight cents per cubic yard. 40,680 00

\$76,275 00

It, however, appears that the claimant expended for fuel, oil, etc. \$9,240 00 Blacksmith and helper 6,930 00 Hose, steels and repairs 16,170 00

\$32,340 00

This exceeds the amount allowed for drilling and does not allow anything for the loading. It could not well have been contemplated that a man could drill a hole from five to twenty feet deep in the rock for six cents per cubic yard and at the same time be compelled to furnish the fuel, oil, blacksmith and helper and repair shop for the sharpening of steels, repairing of drillers, etc., out of the six cents allowed him for drilling. I, therefore, conclude that the six cents per cubic yard for drilling was for the compensation of the driller and the one cent for loading was also for the compensation of the loader and, consequently, there should be credited and allowed the three amounts to which I have called attention, making \$32,240.

There is another item to which attention should be called, and

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that is that the allowing of eight cents per cubic yard for explosives only amounts to \$40,650, whereas the explosives used by claimant amounted to \$81,857.21, making upwards of 50 per cent of dynamite lost.

I am, therefore, of the opinion that the amount allowed for drilling, loading and explosives per cubic yard was insufficient. I have, consequently, increased the allowance for drilling to seven cents per cubic yard. Treating the amount of rock excavated at 508,500 cubic yards, the drilling would amount to \$35,595 00 The loading I have increased to one and one-half

cents per cubic yard which would amount to....	7,627 50
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The explosives I have increased to ten cents per cubic yard which would amount to.....	50,850 00
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Making a total of	\$94,072 50
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Adding thereto the sum of.....	32,340 00
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the amount expended for fuel, oil, blacksmith and

repairs, we have a total of.....	\$126,412 50
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the amount for which the work could be accomplished in case the claimant was not hampered by the railroad barriers. In view of the fact that this amount extends over the entire period there should be deducted from it the amount expended for drilling and blasting during the season of 1910. This approximating one-thirtieth, or \$4,123.75, which I have deducted, leaves the sum of \$122,198.75.

Deducting from the entire expenditure of \$160,823.52 the above amount of \$122,198.75 leaves a balance of \$38,624.77.

OVERHEAD

The next claim on behalf of the claimant is for overhead expenses, fifteen months, \$14,766.87.

Ordinarily the contractor in making his bid is deemed to have made it sufficiently high so as to include his expenses for labor,

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tools and machinery and overhead expenses and profits. If, however, delays occur through the fault of the State and not that of the contractor, overhead expenses become allowable as one of the items of damages. In this case the delays occurred from time to time through the entire life of the contract and it is not easy to determine the exact amount of time caused therefrom; but eliminating the time that elapsed between the commencement of the work upon the contract in 1910 and the 1st day of January, 1911, I think it may confidently be estimated that the time of the delays thereafter occurring amounted to three and one-half months, which would correspond in time from the period fixed in the contract for the completion of the work to the time when work upon the contract actually terminated on the 16th of August, 1913.

Some criticism has been made on behalf of the State with reference to certain items included in the overhead expenses as shown by the books of the company, but as I understand these items have been eliminated in the statement prepared by the claimant which for the fifteen months at the end of the work amounts to \$30,337.59. The amount of work then in progress carried on by the claimant, which is divided among the different contracts then existing, amounted to 32 per cent of the total expenditures which would make \$9,708.03 as the proportionate amount chargeable to contract No. 21; to this sum is added the salary of T. Y. Conway, superintendent on contract No. 21, \$1,151.02; premium on bond, \$1,948.03; expenses of H. L. Lane, president of the company, on contract No. 21, \$918.14; making a total of \$14,766.87 for the fifteen months. Adopting these figures for the fifteen months it would follow that the overhead expenses for the three and one-half months allowed by me would be \$3,455.60.

INSURANCE ON LABOR

While the premiums paid by the contractor on the bond given by him to the State and the insurance of the laborers is chargeable to and comes out of his earnings under the contract, it is not permissible for the State by its default to increase the burden of the

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contractor with reference to bond and insurance premium. I am not advised that the State demanded an additional bond for the extension of the contract from May 1 to September 30, 1913. It would hardly be justified in so doing for the reason that the extension was owing to its own neglect in not causing the railroad barriers to be removed. But as to the insurance of the laborers, the amount actually paid by the contractor for premium on insurance in so far as the labor was in excess of that required for doing the work freed from the barriers, becomes a proper item of damage. I have, consequently, computed from the excess of labor allowed by me in the above classification (excluding bailing and draining for which I have made a separate award) with the wages allowed in each case which amounts to \$49,945.30, which with the premium of \$3 per \$100 amounts to \$1,498.36, which sum I conclude is properly allowable as premium on insurance.

SNUBBING POSTS

Among the claims presented on behalf of the claimant is one for twenty-eight snubbing posts, \$420.

It is claimed on behalf of the State that this valuation is too high; that the posts were made of iron, 12,000 pounds, at two cents per pound, making \$240, and that the expense of shipping the posts from Alta Vista, the place where they were manufactured, to the site of the contract was \$31.72.

If that were all, I should be inclined to agree with the learned Attorney-General upon the subject, but the two cents per pound paid for the iron was doubtless in the pig. The molds or cores have to be made, the iron melted in the furnace, the molten iron run into the molds and cast, which would be an additional item that has not been considered by the State. But what I regard to be a complete answer to the contention of the State upon the subject is that the engineer in his preliminary estimate fixed the amount of the cast iron at three and one-half cents per pound. The bid of the claimant was for the same amount and the contract was let upon that bid. We thus have 12,000 pounds of iron cast into snubbing posts which at three and one-half cents per pound would amount to \$420, the amount claimed.

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CRUSHING STONE

At the termination of the contract the contractor left upon the site a pile of crushed stone which he valued at \$720. A claim is now presented on behalf of the State that the crushed stone was from the stone that was excavated from the contract and, therefore, under the terms thereof belonged to the State. There is, however, another provision of the contract which excepts therefrom "such as can be made use of by the contractor in connection with the work on his contract." Under another provision of the contract, plans and specifications there was a quantity of concrete work that was required to be done, and, as I understand, the crushed stone in question was for the purpose of making such concrete.

I therefore think that the item should be allowed.

RENT OF PLANT

The contractor has presented a claim for rent of plant, fifteen months, \$54,420.

Under the provisions of the contract the claimant agreed to furnish the tools and plant necessary to do the work and accept as compensation therefor the amount of its itemized bid for the work performed. I have already awarded damages for the delays incurred by the laborers through whom the plant was operated and if I am correct in my conclusion that the contract was automatically extended until the barriers were removed, there is no basis upon which any claim for rent can be founded.

LOST CAPACITY OF PLANT

A claim is also presented for the loss of the capacity of the plant amounting to 330,000 cubic yards at forty-eight and one-half cents per yard, \$160,050.

The plant had no capacity unless it was operated by laborers. If the 330,000 yards of earth has reference to that excavated, then it has been included in the awards made under the above classifications of work. If it was intended that the 330,000 yards is included in that which remained unremoved at the time the con-

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tract was terminated, then the contractor by his agreement waived any right to recover damages by reason thereof. In either event the claim should be disallowed.

PAYMENT TO THE PENNSYLVANIA RAILROAD

The contractor paid the Pennsylvania Railroad \$1,650 for a permit to excavate a trench under its terminal for drainage purposes, but before the contractor had any material benefit therefrom, the permit was canceled by the railroad company and the contractor was prevented from proceeding further therewith. Under the evidence produced before me upon the subject, I see no reason why the railroad company should not repay the money received by it to the contractor, but, assuming that the contractor cannot compel a repayment of the money, I do not understand that the contractor has a valid claim therefor against the State. It had no authority from the State to make the agreement or to pay over the money and consequently could not bind the State therefor.

Again, in awarding the damages resulting from the lack of drainage, I have proceeded upon the understanding that both the Pennsylvania Railroad Terminal and the Pennsylvania Main Line tracks were barriers which prevented the drainage of water underneath the tracks and have awarded damages accordingly.

The claim should be disallowed.

INTEREST

In conclusion, the contractor asks for interest on the retained percentages amounting to \$5,546.75.

Under the contract, the State was authorized to retain 10 per cent of the monthly estimates for the purpose of indemnifying it against loss by the failure of the contractor to fully perform the work under the contract. The amount so retained did not become due and payable until the termination of the contract. The contract was not terminated until the 30th day of September, 1913. At that time the duty devolved upon the engineer to make up his final report within a reasonable time. This was done and the amount retained by the State was then paid. No complaint has

been made upon the trial that the engineer delayed his final estimate unreasonably and, therefore, I must reject the claim for interest.

An examination of the record herein will disclose numerous objections to the admission and rejection of testimony and exceptions taken thereto. In a number of instances I reserved the right to consider the evidence as to its materiality upon the final determination of the case, and advised the attorneys that in the final submission I would hear arguments upon such questions. In the submission of the case no further discussion was presented upon the exceptions taken.

The evidence received with reference to the excavating of rock in other localities than that under consideration may only be material as bearing upon the experience of the witness tending to qualify him to give an opinion as an expert. But I have disallowed the claim upon which it was received. I do not deem it necessary to here mention other rulings for in many instances the exception taken has been obviated by the decision made.

A question is raised by the claimant's counsel in his requests to find as to when title of property taken under condemnation proceedings vests in the State. I am aware of a recent decision of the Special Term holding that title to land does not pass until the money awarded is paid therefor. My report, however, proceeds upon the theory that the right of possession under the statute commences at the time of the serving of the notice of the appropriation. Consequently, I have not deemed the time of vesting the title as material in this case.

The statute provides that bridges shall be constructed at least fifteen and one-half feet above the highest stage of navigable water. The plans provided by the engineer in requiring bridges to be constructed thirty feet above the bottom of the canal were not intended to prevent bridges being constructed at a higher point where the surface of the earth upon which the roads were constructed was of a greater elevation. As I understand, the New York Central tracks were over forty feet above the bottom of the canal; the Buffalo, Rochester and Pittsburgh and Pennsylvania Terminal nearly fifty feet. For this reason I have refused a num-

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ber of requests that were based on the supposition that the bridges had to be within thirty feet of the bottom.

Through the requests to find my attention has been called to a claim of \$2,000 and the interest thereon. It appears that at the time of paying the amount determined to be due the claimant on the final estimate of the engineer for the work performed, that a question arose with reference to the completion of the guard lock and at that time an additional agreement was made between the claimant and the State by which the claimant guaranteed that the bridge company having the contract for installing the guard gates would complete the contract and install the gates and for the purpose of insuring the State that such work would be performed, the sum of \$2,000 was placed on deposit with the State as security. I am not advised as to whether the guard lock has been completed. I assume that if it has been completed, the State will pay over the amount deposited as security. I do not understand that the claimant is now asking for any recovery thereon. No reference to it has been made in the claim filed or in the bill of particulars. I consequently have refused to make any finding upon the subject or to treat the matter as within my jurisdiction in this case.

In the final submission of the case, the parties presented 442 requests to find. A considerable number were repetitions in slightly varying form. Many were immaterial upon the theory upon which I had concluded to dispose of the case, and quite a number called for the computation of interest on various sums for various times. I presume the computations embraced in the requests are correct, but in view of the fact that I had decided to allow no interest at all, such requests were quite immaterial. I have patiently been through the list and marked rulings upon each.

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**OPINIONS OF THE COURT OF APPEALS
ON APPEALS**

**FROM THE
COURT OF CLAIMS**

MARY J. BUCKLES, as Administratrix of the Estate of WILLIAM BUCKLES, Deceased, Respondent, *v.* THE STATE OF NEW YORK, Appellant.*

Court of Claims — jurisdiction — notice of intention to file claim must be given pursuant to statute (Code Civ. Pro. § 264).

The Court of Claims has no jurisdiction to hear and determine a claim against the state, where no notice in writing of intention to file a claim has been filed, as required by section 264 of the Code of Civil Procedure. The question being one of jurisdiction, it can be raised at any time and cannot be waived by any officer or authority representing the state.

Buckles *v.* State of New York, 175 App. Div. 677, reversed.

(Argued October 9, 1917; decided November 13, 1917.)

APPEAL from a judgment, entered March 28, 1917, upon an order of the Appellate Division of the Supreme Court in the third judicial department which reversed a judgment of the Court of Claims dismissing the claim of the plaintiff and directed judgment in her favor for the full amount thereof.

The nature of the claim and the facts, so far as material, are stated in the opinion.

Merton E. Lewis, Attorney-General (Edmund H. Lewis, Deputy Attorney-General, of counsel), for appellant.

O. A. Dennis, for respondent.

McLAUGHLIN, J. This appeal involves the question whether the Court of Claims has jurisdiction to hear and determine a claim against the State, where no notice in writing of intention to file a claim has been filed, as required by section 264 of the Code of Civil Procedure.

* Reported in 221 N. Y. 418.

Buckles v. State of New York

In 1912 the respondent's intestate, William Buckles, had a contract with the State for resurfacing a portion of a highway in the county of Washington. After he commenced work under his contract it was discovered that, owing to the condition of the highway, work and materials not covered by it were required to put it in a proper condition. Buckles was thereupon directed by the superintendent of repairs to perform the additional work and furnish the additional materials, or in default of that to abandon his contract. It was expressly provided in the contract that additional work or materials, if required, should be covered by a supplemental contract in writing, and when Buckles was directed to perform such additional labor and furnish such additional materials, he requested that a supplemental contract for that purpose be first executed. This the authorities representing the State refused to do, telling him that a written contract would not be executed until the work had been completed. Buckles then continued under his contract, performed the additional labor and furnished the additional materials. The whole work was completed about the first of November, 1912. He was then tendered a supplemental contract, dated November 11, 1912, which he executed and which was approved in writing by the superintendent of repairs, but a few days later Buckles died, and for that reason it is fair to assume the contract was never executed on the part of the State.

The work was inspected by the proper officers representing the State and a certificate given that the contract, including the additional work and materials, had been fully performed, and he was entitled to receive from the State the contract prices. Since then it has not been questioned but that the value of the additional labor and materials with a small balance unpaid under the original contract, amounting in all to \$2,682.83, was due Buckles and is now due his estate, and this is the amount for which the claim, with interest, was filed. For one reason or another, payment of this sum was delayed from time to time until a new highway commissioner went into office and on the 10th of February, 1914, he advised the respondent's attorney he would not sign the supplemental agreement since he personally knew nothing about the

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matter and that the claim would have to be presented to the Court of Claims. Thereupon, on March 30, 1914, the claim in question was filed with the then Board of Claims, now the Court of Claims (Laws of 1915, chap. 1) and with the Attorney-General. Neither before nor after such filing, however, was there filed any notice of intention to file a claim and the Court of Claims accordingly dismissed the claim on that ground, though the Deputy Attorney-General, representing the State, conceded at the beginning of the trial that the only question involved was whether there could be a recovery in the absence of a supplemental agreement in writing, and he did not raise the question of failure to file the notice until after the claimant had rested. The Appellate Division reversed the determination, one of the justices dissenting, directed judgment for the claimant for the full amount, and the State appeals to this court.*

Upon the record there can be no doubt as to the moral obligation of the State to pay the claim, but notwithstanding that fact, I have, with much reluctance, reached the conclusion that the judgment must be reversed and the claim dismissed.

At the time the claim was filed, section 264 of the Code of Civil Procedure provided in part as follows: "No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the Board of Claims and with the Attorney-General a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths." It is urged that this provision

* The decision of the Appellate Division was based on the contention that the Attorney-General had admitted at the opening of the trial before the Court of Claims that the only question presented to the Court of Claims was as to whether or not the claimant could recover for extra labor and material where no supplemental agreement in writing covered these items. Kellogg, P. J., said: "That was the only question tried; everything else was admitted out of the case, and it was too late after that for the Court of Claims to dismiss the claim upon the ground that there was no proof that a notice to present a claim was filed. The State should be held to the admission made by it on the trial. The claim is so just that if the Attorney-General had asked to withdraw the admission the Court would have been justified in refusing its consent." (175 App. Div. at page 679.) Lyon, J., dissented in an opinion in which Cochrane, J., concurred.

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is similar to the familiar requirement of municipal charters to the effect that no action can be maintained against the municipality unless a notice of intention to sue has been filed within a specified time with the proper officers, and that it is thus, at most, a condition precedent, which can be and has been waived by the State in the present case. Standing alone it might possibly be susceptible of that construction, but the rest of section 264 and its history demonstrates conclusively, as it seems to me, that such construction cannot be maintained.

The requirement as to filing a notice first appeared in section 264 in 1905. (Laws of 1905, chap. 370.) In 1907 this court held that the Court of Claims had no jurisdiction to hear and determine a claim upon a contract which was subject to audit by the comptroller. (Quayle v. State of N. Y., 192 N. Y. 47.) And shortly after that decision, section 264 was amended so as to expressly authorize the determination of claims rejected in whole or in part by the auditing officer. (Laws of 1908, chap. 519.) Claims arising upon or out of a contract with the State had previously been mentioned in the amendment passed in 1906 (chap. 692) and in order to allow past claims of that kind to be determined by the court the 1908 amendment provided that as to claims which had accrued or which had been filed and dismissed for lack of jurisdiction within three years immediately preceding the passage of the act "The court shall have jurisdiction, if a notice of intention to file such claim is filed in the office of the clerk of the Court of Claims and with the Attorney-General within six months and such claim is filed within one year after this section, as amended, takes effect."

It seems perfectly clear from this language that as to claims which had then accrued the filing of the notice of intention was a jurisdictional requirement and there is no possible reason suggested why the Legislature should have required the filing of a notice of intention to file a claim which had been previously filed and dismissed unless it intended to make filing of such a notice in all cases a jurisdictional requirement. That this was the intention is further apparent from the amendment to the section which was passed in 1912 (chap. 545). That amendment relates to the

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Board of Claims substituted in 1911 (chap. 856) for the Court of Claims and provides in part that "The board shall have jurisdiction, and may hear and determine all claims accrued and actually filed at any time prior to the time that this section, as amended, takes effect, and filed within two years from the time they accrued, though no notice of intention to file was given, as required by this section, if such claims when filed were not barred by lapse of time and the court or board had jurisdiction and authority to hear and determine the same except for the lack of such notice; and such jurisdiction shall attach without refileing or previous notice." This provision has been retained in substance in the later amendments to section 264 and the language used is entirely inconsistent with respondent's contention that the filing of the notice of intention merely relates to procedure.

The State being sovereign is immune from action by a private suitor except with its consent. (Quayle v. State of N. Y., *supra*; Gates v. State of N. Y., 128 N. Y. 221, 228.) It is not like a municipal corporation against which an action can be maintained and over which the courts have jurisdiction irrespective of the conditions precedent which may be hedged around the commencement and maintenance of an action. On the contrary, no claim can be litigated at all against the State, except by its permission. A valid cause of action may exist but the State's immunity prevents its enforcement. (Quayle v. State of N. Y., *supra*.) When, therefore, the Legislature in granting permission to prosecute an action against the State required notice of intention to be filed, that condition must be complied with in order to subject the State to an action. As was said in Gates v. State of N. Y., (*supra*): "The state cannot be sued without its consent and it has the right, in authorizing the maintenance of proceedings for the recovery of claims against it, to impose such terms and conditions and to prescribe such procedure as its legislative body shall deem proper. The conditions imposed become jurisdictional facts and determine the status and right of the litigant." Being thus a question of jurisdiction it could be raised at any time and could not be waived by any officer or authority representing the State. (26 Am. & Eng. Ency. of Law [2d ed.], 486, 487; Callahan v.

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Mayor, etc., of N. Y., 66 N. Y. 656; Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315.)

The State has had the benefit of the labor performed and materials furnished of the value claimed and for which it has never paid a cent. Justice would seem to require that the claim should be paid, and that the Legislature, in the exercise of its powers, ought to provide a way for that purpose, but the present judgment cannot be allowed to stand without ignoring the conditions which the Legislature has seen fit to impose in permitting actions to be maintained against the State.

The judgment appealed from, therefore, should be reversed and the determination of the Court of Claims affirmed, with costs in this court and the Appellate Division.

HISCOCK, Ch. J., CHASE, CUDDEBACK, POUND and ANDREWS, JJ., concur; HOGAN, J., concurs in result.

Judgment reversed, etc.

FRED R. BUTTERFIELD, Respondent, v. THE STATE OF NEW YORK, Appellant.*

State — filing of claim not equivalent to filing of notice of intention to file a claim.

The filing of a claim against the state is not equivalent to the filing of the written notice of intention to file a claim provided for by section 264 of the Code of Civil Procedure. (Curry v. City of Buffalo, 135 N. Y. 366; Buckles v. State of N. Y., 221 N. Y. 418, followed.)

Butterfield v. State of New York, 178 App. Div. 292, reversed.

(Argued October 9, 1917; decided November 13, 1917.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 8, 1917, which reversed a determination of the Court of Claims dismissing the claim of the respondent herein, and remitted the matter to said Court of Claims for further consideration. The Court of Claims dismissed the claim herein upon the ground that no proof was offered establishing the filing in the office of the clerk of the Board of Claims and with the attorney-general of a

* Reported in 221 N. Y. 701.

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“ notice of intention to file a claim ” against the state pursuant to section 264 of the Code of Civil Procedure. That court refused to pass upon the contention by the claimant that it appeared from the evidence that the claim was filed within six months from the date it accrued.[†] The Appellate Division in reversing the order of the Court of Claims held that the filing of the claim in the office of the clerk of the Court of Claims and in the office of the attorney-general within six months from the date when the claim accrued would be a substantial compliance with section 264 of the Code of Civil Procedure, although no “ notice of intention to file a claim ” against the state had been filed. The claim was, therefore, remitted to the Court of Claims for determination by that court of the date when the alleged damage accrued and proof of other facts alleged in the claim.[‡]

Merton E. Lewis, Attorney-General (Edmund H. Lewis, Deputy Attorney-General, of counsel), for appellant.

W. E. Young and W. Chase Young for respondent.

Per Curiam. The order appealed from should be reversed, and the determination of the Court of Claims affirmed, with costs in this court and in the Appellate Division, upon the authority of *Buckles v. State of New York* (221 N. Y. 418).

The filing of the claim itself, even within six months, is not equivalent to the filing of the written notice of intention to file a claim against the State provided for by section 264 of the Code of Civil Procedure. (*Curry v. City of Buffalo*, 135 N. Y. 366.)

HISCOCK, Ch. J., CHASE, CUDEBACK, POUND, McLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., concurs in result.

Order reversed, etc.

[†] The opinion of the Court of Claims is reported in this volume at page 24.

[‡] The opinion of the Appellate Division is reported in 178 App. Div. 292.

**OPINIONS OF THE APPELLATE DIVISION OF THE
SUPREME COURT, THIRD DEPARTMENT,
ON APPEALS**

FROM THE

COURT OF CLAIMS

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**Opinions of the Appellate Division of the Supreme Court,
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**OPINIONS OF THE APPELLATE DIVISION OF THE
SUPREME COURT, THIRD DEPARTMENT,
ON APPEALS**

**FROM THE
COURT OF CLAIMS**

**THE CITY OF NEW YORK, Appellant, v. THE STATE OF NEW
YORK, Respondent.***

Supreme Court, Appellate Division, Third Department, November 15, 1916.

Intoxicating liquors — Liquor Tax Law, section 10 and section 12, subdivision 17, construed — interest on excise moneys — failure of special deputy commissioners to divide moneys between city and state within time specified.

Under section 10 and subdivision 17 of section 12 of the Liquor Tax Law, taxes, fines and penalties collected by and paid to the special deputy commissioners of excise in the city of New York are to be divided equally between the State and city, said commissioners having ten days in which to divide the money and pay one-half thereof to the State and the city. In the meantime, the statute provides that all such moneys shall be deposited in designated banks, and that all interest accruing on such "undivided excise moneys * * * and all interest accruing on the part thereof apportioned to the State shall belong to the State of New York."

The law regards that as done which ought to have been done and the deputy commissioners of excise by failing to divide the moneys until after the expiration of ten days in violation of the statute, cannot deprive the city of interest on the moneys deposited.

The most that the State can claim is interest on the full deposits for ten days after they were received by the deputy commissioners.

APPEAL by the claimant, The City of New York, from a judgment of the Court of Claims, entered in the office of the clerk of said court on the 14th day of February, 1916, disallowing its claim for \$7,602.61 against the State of New York and awarding it judgment in the sum of \$302.90 only.†

* Reported in 175 App. Div. 252.

† The opinion of the Court of Claims is reported in this volume at page 21.

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Lamar Hardy, Corporation Counsel (Terence Farley and Josiah Stover of counsel), for the appellant.

Egburt E. Woodbury, Attorney-General (James S. Y. Ivins, Deputy Attorney-General of counsel), for the respondent.

COCHRANE, J. The city of New York makes a claim against the State of New York for interest received by the latter on excise moneys deposited, after collection during September and October, 1914, by the special deputy commissioners of excise of the city in various city banks which excise moneys belong to the city but were not paid over to it by said special deputy commissioners within the statutory time.

Section 10 of the Liquor Tax Law (Consol. Laws, chap. 34; Laws of 1909, chap. 39)* is in part as follows: "The taxes assessed, and all fines and penalties incurred under this chapter in counties or boroughs having a special deputy commissioner of excise shall be collected by and paid to him. * * * One-half of the revenues resulting from taxes, fines and penalties under the provisions of this chapter less the amount allowed for collecting the same, shall be paid by the county treasurers, and by the several special deputy commissioners receiving the same within ten days from the receipt thereof, to the Treasurer of the State of New York to the credit of the general fund, as a part of the general tax revenue of the State and shall be appropriated to the payment of the current general expenses of the State, and the remaining one-half thereof, less the amount allowed for collecting the same, shall belong to the town or city in which the traffic was carried on from which revenues were received, and shall be paid by the county treasurer of such county, or by the special deputy commissioner to the supervisor of such town, or to the treasurer or fiscal officer of such city, within ten days from the receipt thereof. All excise moneys collected by county treasurers and special deputy commissioners of excise shall be deposited until the same shall be paid over to the State Treasurer or local fiscal officer as is herein provided, in bank or other depositories designated by the State Commissioner of Excise, * * *."

* Since amd. by Laws of 1916, chap. 416.— [REP.]

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By subdivision 17 of section 12 of the Liquor Tax Law (as amended by Laws of 1909, chapters 240, 281) it is provided as follows: "Said special deputy commissioner or county treasurer must keep a separate and distinct account of all excise moneys received and paid over by him; and such moneys must be deposited without delay in a bank or other depository, and kept in a separate account, in the official name of such officer, entitled 'liquor tax moneys.' * * * All interest accruing on undivided excise moneys deposited by any county treasurer or special deputy commissioner of excise, and all interest accruing on the part thereof apportioned to the State shall belong to the State of New York, and shall be remitted by such county treasurer or special deputy commissioner to the State Treasurer. All interest moneys accruing on the part thereof belonging to the localities, until the same shall be actually withdrawn from the bank of deposit, upon the check of the county treasurer or special deputy commissioner, by the fiscal officer of the locality entitled thereto, shall belong to the county or city represented by such treasurer or special deputy commissioner, and shall be placed to the credit of the general fund thereof as often as once in each three months."

Under the foregoing statutory provisions the special deputy commissioners of excise for the various boroughs of New York city collected taxes, fines and penalties imposed under the provisions of said law upon the traffic of liquor in said city and deposited the same in various designated banks of the city as they were required to do. The banks paid interest on the deposits. The special deputy commissioner did not, however, within the statutory period of ten days, divide the moneys so deposited and pay one-half thereof to the State and the other half to the city as the statute requires. Such division and payment was made after the expiration of ten days from the time such moneys were received by the special deputy commissioners, and all interest accumulated thereon in the banks to the time of such payments was paid by the banks to the State. The city now claims all interest so received by the State on the one-half of the moneys belonging to the city from the time the money was first deposited in the bank and interest began to accrue thereon until such interest

was paid to the State. This claim has been disallowed by the Court of Claims except as to a small amount where a division of the funds had actually been made.

The scheme of the statute is quite apparent. The taxes, fines and penalties are to be divided equally between the State and the city. They are to be collected by the special deputy commissioners of excise and paid to them. They have ten days in which to divide the same and pay one-half thereof each to the State and the city. In the meantime the statute provides that all such moneys shall be deposited in designated banks and kept separately in a separate account in the official name of the officer receiving the same, entitled "liquor tax moneys." And the statute then specifically provides that all interest accruing on such "undivided excise moneys * * *" and all interest accruing on the part thereof apportioned to the State shall belong to the State of New York." Until the division is made the State is entitled to interest on all the deposits. But such division must be made within ten days, and if the special deputy commissioners fail in this statutory duty they cannot thereby deprive the city of interest earned on moneys which legally and equitably belong to it. The city loses nothing and the State gains nothing by the failure of these officers to perform their plain duty. The most that the State can claim is interest on the full deposits for ten days after they were received by the deputy commissioners. The law regards that as done which ought to have been done. It was the duty of the special deputy commissioners to make payments within ten days, one-half each to the State and to the city. Had they done so the city would have received the interest on such payments. Failure to perform their statutory duty does not give the State a legal claim to the interest which the statute does not contemplate the State shall receive and which it would not have received except for the fact that the deputy commissioners failed in the performance of their duty.

The statute recognizes that one-half of these moneys belonged to the city from the time they were received by the special deputy commissioners. The language is: "The remaining one-half thereof, less the amount allowed for collecting the same, shall

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belong to the town or city in which the traffic was carried on from which revenues were received." And again: "All interest moneys accruing on the part thereof belonging to the localities, until the same shall be actually withdrawn from the bank of deposit, upon the check of the county treasurer or special deputy commissioner, by the fiscal officer of the locality entitled thereto, shall belong to the county or city represented by such treasurer or special deputy commissioner, and shall be placed to the credit of the general fund thereof as often as once in each three months." The intent of the Legislature cannot well be misunderstood. It contemplates one-half the money as belonging to the city. All interest on such one-half goes to the city except as provided by the statute that until an actual payment thereof by the special deputy commissioners within ten days such interest by virtue of the statute goes to the State. But it was clearly the intent of the statute that after ten days from the time the money was received the State should not receive interest thereon except as to its own one-half portion thereof and any accumulation after that time on the portion belonging to the city should be paid to the city.

It follows that the city is entitled to recover from the State the amount of interest which the latter has received on the one-half of the moneys belonging to the city and which accrued after the expiration of ten days from the time such moneys were collected by the special deputy commissioners of excise.

The judgment should, therefore, be reversed and the matter remitted to the Court of Claims for further action.

All concurred.

Judgment reversed and matter remitted to the Court of Claims for further action.

Konner v. State of New York

VICTORIA KONNER, Respondent, v. THE STATE OF NEW YORK,
Appellant.*

Supreme Court, Appellate Division, Third Department, December 28, 1917

Negligence — Filing claim against State for negligence in constructing highway — Amendment of claim — Effect of filing notice of intention to file claim due to negligence.

Where a claimant filed a notice of intention to file a claim, and also the claim itself, upon the ground of negligence of the State in so constructing a highway abutting upon the claimant's premises that her property was undermined, deprived of its support and ruined, and maintained this position until the opening of the trial, she should not be permitted to amend her claim so as to substitute an action for trespass, she having offered no excuse for the neglect or failure to properly state the facts sought to be included in the amendment.

A notice of intention to file a claim against the State for damages due to negligence is a disclaimer of intention to file a claim for the same damages growing out of an alleged trespass, under the maxim *expressio unius est exclusio alterius*.

Kellogg, P. J., and Cochrane, J., dissented.

APPEAL by the State of New York, from a judgment of the Court of Claims, in favor of the claimant, entered in the office of the clerk of said court on the 24th day of October, 1916.†

Merton E. Lewis, Attorney-General (Edmund H. Lewis, Deputy Attorney-General, of counsel), for the Appellant.

Harry M. Beck, of Liberty, N. Y. (Joseph Rosch, of counsel), for the Respondent.

WOODWARD, J. On the 20th day of May, 1913, the claimant in this action filed a "Notice of Intention to File Claim" in the office of the Attorney-General and with the Board of Claims of the State of New York as required by section 264 of the Code of Civil Procedure. This notice stated that "I intend to bring an action against the State of New York, before the Board of Claims, to recover damages to my property, situate in the village of Parksville," etc., and that "the damages resulted from the carelessness

* Reported in 180 App. Div. 837.

† The opinion of the Court of Claims is reported in this volume at page 92.

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and negligence of the State in the construction of State Highway Number 5223, which highway runs through the village of Parksville, and passes alongside the premises of the claimant; that the claimant's property was destroyed and made uninhabitable because of the destruction of the foundation supporting the premises by the State employees, and the failure of the State to build a retaining wall to support the premises; * * * that the premises were ruined on or about the first day of May, 1913, and that as claimant is informed and believes the action against the State arose about the first day of May, 1913."

Subsequently, and on the 5th day of November, 1913, the claimant verified her claim, in which she alleged for a first cause of action substantially the same matters as in her notice of claim, and further alleging ownership of the premises involved, and that she was conducting a summer boarding house upon said premises; "that on or about the first day of May, 1913, without any negligence on claimant's part, the wall supporting said premises gave way, causing the premises to fall, wrecking and ruining the same, destroying the foundation thereof, and the approach thereto, making the said premises untenable and unsafe to live in, and all this because of the negligence of the State of New York, its agents and contractors, and because of the destruction by the state, its agents and contractors, of the embankment extending alongside of said road, upon which said premises rested, and the failure of the State of New York, its agents and contractors, to replace and maintain a new and suitable and proper embankment for the support of said premises." It was then alleged that "this claim was filed within two years and a notice of intention to file the claim was filed within six months after the claim accrued as required by law," and that the premises have been in such a condition that the claimant could not occupy the same since the first day of May, 1913, and for some days prior thereto, and that she has been damaged in the sum of \$5,000.

In the second cause of action the material facts above set forth are realleged, and damages by reason of the prevention of the boarding house business for the summer of 1913, are claimed to

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the amount of \$2,500, but nowhere in the notice of intention, nor in the claim as filed, is there any suggestion of any wrongdoing on the part of the State until on or about the first day of May, 1913, and the sole ground of damages is the alleged negligence of the State in connection with the State highway work known as No. 5223; the claim is "for negligence of the State of New York in the construction of a highway known as Highway No. 5223," and "particularly in failing to provide a suitable embankment for the support of claimant's premises, abutting upon said highway." The claim is, in effect, that the State of New York so negligently carried on the work of constructing this highway, abutting upon the claimant's premises, that the property was undermined, deprived of its support and ruined. There was no suggestion of any trespass upon the claimant's property, or that any of her rights had been invaded, except through the negligence of the State in constructing this highway, and as the statute (Code of Civil Procedure, section 264) expressly provided that "in no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity," it is entirely obvious that the claim as announced in the notice of intention, and as amplified in the subsequent pleadings, failed to state facts sufficient to constitute a cause of action.

Confronted with this situation, the learned counsel for the claimant moved at the opening of the case to amend "the claim filed with the Board of Claims in this action, by inserting in the first line, after the word 'negligence,' the words 'trespass and unlawful entry,' and after the word 'for' in the second paragraph the words 'and in possession,' after the word 'negligence' in the third paragraph, fourth line, insert the words 'trespass and unlawful entry,' and also by inserting a fourth paragraph of the first cause of action we claim the following fact: That on or about the first day of May, 1913, prior as well as subsequent thereto, the said State of New York through its officers and agents unlawfully entered into and upon said premises, and excavated

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the retaining wall and portion of the front yard and approaches of said premises, and the land in front of same, and destroyed the same by its wrongful acts."

Of course the effect of this proposed amendment was to substitute a cause of action for trespass in the place of one founded wholly upon negligence. It was not an amendment of a good cause of action by inserting an allegation material to the complaint; it was a submerging of the allegations of negligence, rendering them mere surplusage, in an entirely new cause of action, and one which had not been hinted at in the notice of intention to file the claim. The learned counsel for the State promptly recognized this situation and objected to the change of front thus attempted, setting forth all the grounds therefor, and the court reserved its decision until the close of the evidence, when it granted the motion, the State preserving its exceptions to the rulings. In making its original rulings the court assured the State that "if any evidence is admitted here which is not strictly within the present pleadings, within the amendment, or if I permit the amendment, that the State will be afforded every means or opportunity by adjournment, and by every means in my power, to meet that line of proof, so that the rights of the State will be safeguarded," and it is urged upon this appeal that because the State was given these assurances that in some manner the right to insist upon the reasonable requirements of the law in such cases has been relinquished by the State, and that the determination of the Court of Claims should receive the sanction of this court. Indeed, this seems to be the attitude of the learned jurist presiding at the trial, for in an opinion, supporting his ruling, he says: "In my opinion there is no unfairness to the defendant in premitting the amendment. The notice of intention and the claim itself were ample notice to the State of the transaction, and a full opportunity was given to the State for such adjournment and facility as it might desire, to meet the amendment."*

This is merely begging the question. It is not one of fairness, but of jurisdiction. No tribunal can get jurisdiction by merely

* This opinion of the Court of Claims is reported in this volume at page 92.

being fair; it must have back of it some provision of law giving the power to hear and determine the subject-matter, and the right to amend a pleading given by section 723 of the Code of Civil Procedure, and inhering in courts of general jurisdiction, presupposes that there is something within the jurisdiction of the court to be amended; that there is, at least, the rudiments of a cause of action or defense which may be supplemented and brought into form. The language of the Code is that "the court may, upon the trial, * * * in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding. * * * by inserting an allegation material to the case," and this clearly contemplates that the case itself shall present some kind of an action, merely requiring the addition of an allegation material to such case. It goes further and provides that "where the amendment does not change substantially the claim or defence" the pleadings may be amended "by conforming the pleading or other proceedings to the facts proved." But this clearly does not permit of a substitution of a cause of action entirely different from the one originally asserted. (*Deyo v. Morss*, 74 Hun, 224.) Nor does it permit of an amendment to fit evidence which has been introduced into the case while the motion for such amendment was pending, and which was subject to the objection raised against the amendment itself. The provision of the Code of Civil Procedure, permitting the amendment of the complaint to conform to the facts proved, where it did not substantially change the claim or defense, was intended merely to adjust the pleadings to the facts as they were permitted to be developed upon the trial without objection. But here the objection is to the amendment itself, which attempts to set up a claim which was in no manner suggested by the notice of intention to file a claim, nor by the original pleadings; it is the substitution of a cause of action for trespass, where the notice of intention and the original claim both specifically alleged negligence.

It seems to us entirely clear that there was no notice of intention to file a claim for alleged trespass. A notice of intention to file a claim against the State for damages, due to negligence, is a

Opinion by Woodward, J.

disclaimer of intention to file a claim for the same damages growing out of an alleged trespass, under the maxim *expressio unius est exclusio alterius* (Aultman & Taylor Co. v. Syme, 163 N. Y. 54, 57), and when to this is added the actual filing of the claim upon the ground of negligence, and a maintaining of that position until the opening of the trial, we are persuaded that the claimant is in no better position than she would be if she had filed no notice of intention whatever. In such a case, of course, the claimant has no standing. (Buckles v. State of New York, 221 N. Y. 418; Gates v. State, 128 id. 221.)

Certainly no court of general jurisdiction would have permitted so radical a change in the pleadings at the trial over the objections of the opposing party. The most that would have been thought permissible would have been to suspend the trial and permit the party to go to the Special Term for an amendment, where Rule 23 of the General Rules of Practice requires that "all motions for relief to which a party is not entitled as matter of right shall be made upon papers showing merits, and the good faith of the prosecution or defence," and this rule has been held to require that the moving party must make the affidavit, and, unless under very special circumstances, that it shall be made to appear that the party asking the favor was not in possession of the necessary facts at the time the original pleadings were made. (Nichols' New York Practice, sec. 905; Rhodes v. Lewin, 33 App. Div. 369, 370, 371; Ryan v. Duffy, 54 App. Div. 199; Tompkins v. Continental Nat. Bank, 71 App. Div. 330; Mutual Loan Association v. Lesser, 81 App. Div. 138, 140; Henry & Co. v. Talcott, 89 App. Div. 76, 79; Rothschild v. Haviland, 172 App. Div. 562, 563.) Here the party must have known all of the facts at the time the notice of intention and the claim were made, and there is no excuse offered for the neglect or failure of the claimant to properly state the very facts which were sought to be brought in by the amendment.

The judgment and determination of the Court of Claims should be reversed and the claim dismissed, with costs.

Munro v. State of New York

JOHN I. MUNRO, Respondent, v. THE STATE OF NEW YORK,
Appellant.*

Supreme Court, Appellate Division, Third Department, December 28, 1917.

Constitutional Law — Constitutionality of chapter 658 of the Laws of 1915 authorizing Court of Claims to hear and determine claim of State employee for which the State would not otherwise be liable.

Chapter 658 of the Laws of 1915, authorizing the Court of Claims to hear, audit and determine the claim of an electrician employed by the State at a State hospital for the insane, for injuries alleged to have been sustained by him in the course of his employment, by reason of being struck by a patient, for which the State was not otherwise liable, and further providing that said claim, if found to be valid, shall constitute a legal and valid claim against the State, is constitutional.

Said act does not audit or allow the claim so as to violate section 19 of article 3 of the Constitution, nor does it give or loan money or credit of the State "to or in aid of any association, corporation or private undertaking" in violation of section 9 of article 8 of the Constitution, nor does it appropriate public moneys for local or private purposes within the meaning of section 20 of article 3 of the Constitution.

Cochrane, J., dissented with opinion, in which Lyon, J., concurs.

APPEAL by the defendant, The State of New York, from a judgment and determination of the Court of Claims, entered in the office of the clerk of said court on the 9th day of December, 1916, awarding to the claimant the sum of \$21,284 for damages alleged to have been sustained by reason of an assault by an inmate of Kings Park State Hospital.†

Merton E. Lewis, Attorney-General (Edmund H. Lewis, Deputy Attorney-General of counsel), for the Appellant.

Baylis & Sanborn (141 Broadway, N. Y.), Willard N. Baylis of counsel, for the Respondent.

WOODWARD, J. The claimant, John I. Munro, was employed by the State of New York as an electrician in and about the Kings

* Reported in 181 App. Div. 30.

† The opinion of the Court of Claims is reported in this volume at page 149.

Opinion by Woodward, J.

Park State Hospital for the Insane. On the 27th day of September, 1909, he was directed to make certain repairs to the electric wires in the highway near the hospital, and while so employed he was assaulted by one of the inmates of the hospital who, under the direction of keepers, was with others engaged in sodding a portion of the highway. The claimant was struck over the head with a spade and sustained serious injuries, and we will assume for the purposes of this appeal that the State of New York was negligent in the premises in such a manner as to entail legal liability if the employer had been a private individual. There seems to be no question as to the merits of this case, and, with the modern tendency to hold individuals and corporations to liabilities unknown to the common law, it would seem to follow that the State itself should be held to a like liability in so far as the laws will permit.

Actuated by this humane impulse, no doubt, the Legislature enacted chapter 658 of the Laws of 1915, effective by its terms on the 19th day of May, by which it was provided that the "court of claims is hereby authorized to hear, audit and determine the claim of John I. Munro against the state for injuries alleged to have been sustained by him while in the employ of the state in the electrical department of the Kings Park State Hospital at Kings Park, and in the course of such employment, by reason of being struck by a patient in such hospital; and if the court finds that such injuries were so sustained, damages therefor shall constitute a legal and valid claim against the state, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable, notwithstanding the lapse of time since the accruing of damages, provided the claim herein is filed with the court of claims within one year after this act takes effect." The Court of Claims took jurisdiction of the case, under this statute, and has made an award of \$21,284, and the State of New York appeals from that award, urging that the act of the Legislature violates various provisions of the Constitution of the State.

It is probably true, as suggested by the appellant, that the State, in conducting a public hospital, would not be liable to an action of negligence for an injury resulting from the conduct of an inmate

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of the hospital, but the Legislature, by its enactment, has provided that this claim shall, if found to be valid, constitute "a legal and valid claim against the State, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable", so that we are not concerned with the question of legal liability; the Legislature has provided for this, if the enactment is within constitutional limits. We are thus brought to the consideration of the broad question, "is chapter 658 of the Laws of 1915 constitutional?"

It is first urged that this statute contravenes the provisions of section 19 of article III of the Constitution, which provides that the Legislature "shall neither audit nor allow any private claim or account against the state, but may appropriate money to pay such claims as shall have been audited and allowed according to law." It seems to us that the act of 1915 does not audit or allow this claim; it merely provides that if the Court of Claims finds that "such injuries were so sustained, damages therefor shall constitute a legal and valid claim against the state, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable." It is true that this does not apparently give the Court of Claims a wide discretion in the premises, but it does permit of a judicial investigation into the cause and effect of the injuries, and the amount to be justly awarded, and if there were no other difficulties in the case we are inclined to think the Legislature would be within its powers in providing compensation to one injured in its employ without fault on his part. But we are commanded, in the construction of the Constitution, as of other instruments, to read and construe the whole instrument, and to give effect to each part, and as chapter 658, of the Laws of 1915, impliedly promises to appropriate the money necessary to the payment of this legal claim, as allowed by the Court of Claims, we reach the question whether the claim, as audited and allowed, is one allowed according to law, and upon this proposition there appears to be no question, provided the Legislature had the power to authorize the Court of Claims to act.

We are asked to hold that chapter 658 of the Laws of 1915 violates the provisions of section 9 of article VIII of the State

Dissenting Opinion by Cochrane, J.

Constitution, but we are wholly unable to discover that the credit or money of the State is being given or loaned "to or in aid of any association, corporation or private undertaking." The money is being paid to discharge a legal claim recognized by the Legislature, and if the Legislature has the right to provide for such a payment it certainly does not involve a gift by the State. The bill is, undoubtedly, a private bill, but it is not in aid of a private undertaking under any fair construction of the language of the Constitutional provision.

We are equally persuaded that the statute does not contravene any of the provisions of section 20 of article III of the Constitution. This act does not purport to appropriate any moneys whatever; it merely authorizes the audit of a private claim against the State of New York, and when this is done the Legislature may appropriate the money necessary for the purpose. This stage has not yet been reached, and it may not be presumed that there will be any defect in the legislation which is to follow.

The Legislature has vested in the Court of Claims the power to determine the just and equitable amount to be paid the claimant, and in the absence of some fact or circumstance tending to show an abuse of this discretion we are of the opinion it is not for this court to interfere.

Even if the State was not legally liable for the injury to the claimant, there was such a moral obligation, or such a basis for saying that there was a moral obligation, that the Legislature might well provide that the State should bear the loss; it had the right to make the moral obligation, which it found, a legal one, and assume liability. This we think may be sustained on well established principles.

The award of the Court of Claims should be affirmed.

COCHRANE, J., dissenting.

My criticism of the legislation in question is that it is obnoxious to the spirit and purpose of the constitutional prohibition against an audit or allowance of a private claim by the Legislature. If this claimant or any citizen of the State while in the employ of

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any person or corporation within the State had sustained the same injury under the same circumstances, before he could recover it would be necessary for him to prove not only the negligence of his employer but his own freedom from contributory negligence. These essential elements have been eliminated in this case. All that the Court of Claims is required to do is to determine that the injuries of the claimant were "sustained by him while in the employ of the State in the electrical department of the King's Park State Hospital at King's Park, and in the course of such employment, by reason of being struck by a patient in such Hospital", and to assess the damages for such injuries. The essential elements of a cause of action for negligence have been withheld from the Court of Claims and non-essentials only submitted to that court for determination. The hearing before that court is largely reduced to a formality. In reality a cause of action has been created in favor of this claimant which did not exist in favor of any other citizen at the time of the accident in question, and which as to such citizen would be barred by the statute of limitations. Undoubtedly the State may pay moral and equitable obligations but the morality and equity of this claim cannot be asserted until it has first been determined that the State was negligent and that the claimant was free from negligence, and it seems to me that the Legislature in determining those questions has to that extent audited and allowed this claim, and has left nothing to the Court of Claims except a mere shell from which the substance has been extracted.

Judgment of the Court of Claims affirmed, with costs.

Wright v. State of New York

GEORGE S. WRIGHT, Respondent, v. THE STATE OF NEW YORK,
Appellant.*

Supreme Court, Appellate Division, Third Department, November 14, 1917.

Master and servant — Laws of 1870, chapter 385, and amendment thereto
regulating hours of labor and rate of wages construed — Claim for work
over time under said statute at prevailing wages.

Under chapter 385 of the Laws of 1870, providing that eight hours shall
constitute a legal day's work, extra compensation cannot be demanded, in
the absence of an agreement therefor previously made by the parties.

Hence, a locktender employed by the State of New York who worked for a
continuous period of twelve hours per day and accepted pay at the rate of
forty-two dollars and fifty cents per month, without objection and without
demand or request that he be required not to work more than eight hours per
day, is not entitled to compensation for the four hours a day overwork at the
prevailing rate of wages for laborers during said period in the vicinity,
which was one dollar and fifty cents per day of eight hours.

But since the amendment of said statute by chapter 622 of the Laws of
1894, providing that "laborers so employed shall receive not less than the
prevailing rate of wages in the respective trades or callings in which such
mechanics, workmen and laborers are employed in said locality," said lock-
tender is entitled to such additional compensation for services rendered
subsequent to the day when such amendment became effective.

APPEAL by the defendant, The State of New York, from an
order and determination of the Court of Claims in favor of the
claimant, entered in the office of the clerk of said court on the
7th day of October, 1916.

From the 1st of May until the 1st of December in each of
the years 1893 and 1894 the claimant was a locktender on the
Erie canal. The compensation of locktenders during those
periods was fixed by the Superintendent of Public Works at
forty-two dollars and fifty cents per month, by schedule filed by
him with the Comptroller prior to the first day of May in each
year. During every day of his employment the claimant was
on duty for a continuous period of twelve hours, pursuant to
rules and regulations established by the Superintendent of Pub-

* Reported in 180 App. Div. 151. The opinion of the Court of Claims is
reported in this volume at page 85.

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lic Works. On or about the first day of each month he was paid the sum of forty-two dollars and fifty cents, and he signed and receipted each month for each payment on a payroll furnished for that purpose by the Superintendent of Public Works, and such payrolls so signed by him stated and showed on their face that his compensation was fixed at forty-two dollars and fifty cents a month, and that he acknowledged receipt of that amount by signing his name thereto. The claimant did not demand more than forty-two dollars and fifty cents per month for his compensation while he was acting as such locktender, nor did he demand or request that he be required not to work more than eight hours a day at any time. Nothing was said at any time about the number of hours each day he should work, or about his compensation. The prevailing rate of wages for laborers during the years 1893 and 1894 in the vicinity where the claimant was working was one dollar and fifty cents per day of eight hours.

The claimant filed his claim April 25, 1895, demanding \$297.50, being for four hours a day overwork for each day between May 1 and December 1, during the years 1893 and 1894 at the rate of one dollar and fifty cents for each eight hours. This claim was allowed by the Court of Claims, and from the judgment allowing the same the State appeals to this court.

Merton E. Lewis, Attorney-General (Edmund H. Lewis, Deputy Attorney-General, of counsel), for the Appellant.

Richard Hurley (Charles J. Palmer of counsel), for the Respondent.

COCHRANE, J. The claim of the respondent for labor performed prior to May 10, 1894, rests on chapter 385 of the Laws of 1870; and his claim for labor performed subsequent to that time rests on said statute as amended by chapter 622 of the Laws of 1894, which amendment became effective on that day.

The unamended statute in section I provides as follows: "On and after the passage of this act, eight hours shall constitute a legal day's work for all classes of mechanics, workingmen and

Opinion by Cochrane, J.

laborers, excepting those engaged in farm and domestic labor; but overwork for an extra compensation by agreement between employer and employee is hereby permitted." The second section merely makes the act applicable to persons in the employ of the State or municipal corporations therein or persons contracting with the State or such corporations for performance of public works.

That Act was before the court in *McCarthy v. The Mayor, etc.*, of New York, 96 N. Y. 1. The court called attention to the fact that the Act was an "eight hour statute," but that it did not assume to regulate the rate of wages, and that by the terms of the Act over work for extra compensation by agreement was permitted. The court continued: "The language of the act does not authorize any inference that it was intended to confer the right upon persons employed, to charge for more than one day's labor for the services rendered in any calendar day; but on the contrary such an inference is plainly repelled by the express provision authorizing extra compensation for over work when the agreement provides for it. By settled rules of construction this provision must be held to mean that neither extra labor can be required, nor extra compensation demanded, except in the case of an agreement therefor previously made by the parties. So when the exigencies of his employment, or the requirements of his employer, call upon the laborer for a greater number of hours of labor than those specified in the statute, it is optional with him, either to refuse to perform them, or to insist, as the condition of their performance, upon the payment of extra compensation for the extra work; but in the absence of such an agreement, the provisions of the act do not authorize a demand for the extra compensation."

There was in this case no express agreement for extra compensation and the circumstances do not warrant an inference that there was such an implied agreement. On the contrary the conduct of the claimant indicates that he understood that he was receiving each month all the compensation to which he was entitled. Each monthly pay-roll signed by him contained a state-

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ment that his compensation was fixed at \$42.50 per month, and he acknowledged receipt of the same. There was no protest or reservation of a claim for over work or complaint that his hours of labor were in excess of the statutory requirements, or for any other reason were unduly prolonged. The case cited is a complete answer to the claim of the respondent for services performed prior to the amendment of the statute.

By that amendment there was added to section 2 of the Act the following: "All such mechanics, workingmen and laborers so employed shall receive not less than the prevailing rate of wages in the respective trades or callings in which such mechanics, workingmen and laborers are employed in said locality." By such amendment the Act regulated not only the hours of labor, but also the rate of wages, and the observation in the McCarthy case (*supra*) that the Act was not intended to affect or regulate the rate of wages became obsolete. The precise question involved in so much of this claim as relates to services rendered subsequent to May 10, 1894, the day when the amendment became effective, was before this court in *McCammon v. The State of New York*, 117 App. Div. 913, decided without opinion. That decision is controlling on this court as to all questions raised under the amended statute. See also *Clark v. The State of New York*, 142 N. Y. 101.

It follows that the judgment should be modified by reducing the same to so much of the respondent's claim as accrued subsequent to May 10, 1894.

Judgment modified by reducing the same to \$141.25, and as so modified unanimously affirmed without costs.

CLAIMS DISPOSED OF
BY THE
COURT OF CLAIMS
DURING THE YEAR 1916

[335]

CLAIMS DISPOSED OF

BY THE

COURT OF CLAIMS

DURING THE YEAR 1916

The following table gives the claims disposed of by the Court of Claims during the year 1916. This table is followed by (1) a list of the awards filed with the court in 1916 by retired judges of the Court of Appeals acting as official referees under chapter 229 of the Laws of 1911, and (2) a statement of the judgments entered by the Court of Claims in 1916 pursuant to the direction of the Appellate Division of the Supreme Court, Third Department, and the Court of Appeals.

The following are the claims in which final disposition has been made by the Court during 1916:

No.	Name of Claimant	Amount Claimed	Amount Awarded
1817-A	Abraham, Owen E.	\$1,768 25	\$1,768 25
8187	Acer, Kate B.	1,800 00	State
1130-A	Ackerman, George W. & ano.	4,500 00	¹ Dismissed
1009-A	Ackermann, Frederick T. & ano.	1,321 18	1,321 18
1966-A	Acme Eng. & Contract- ing Co.	281,210 48	100,000 00
2677-A	Adams, George	3,500 00	619 05
10457	Adams, George D.	304 00	65 00
1913-A	Adirondack Farms	1,000 00	426 02
9748 2823-A	{ Adirondack Woolen Co. {	{ 225,150 00 } { 325,000 00 }	65,000 00
10710	Agresta, Guiseppi	156 00	² Dismissed
887-A	Allen, Frank	2,000 00	³ Dismissed

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

³ Dismissed upon stipulation.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14336	Allen, Frank W. & ano.	\$11,448 60	¹ Dismissed
1642-A	Allen, Sarah Mrs.	10,000 00	*
10162	Allen, William D. and Susan	11,448 60	¹ Dismissed
10858	Allen, William H. & ano.	8,600 00	¹ Dismissed
1558-A	Allen, William H. & ano.	6,280 00	¹ Dismissed
2797-A	Amalgamated Gum Company	10,722 50	¹ Dismissed
657-A	American Telephone & Telegraph Co.	3,102 26	¹ Dismissed
658-A	American Telephone & Telegraph Co.	4,000 00	¹ Dismissed
660-A	American Telephone & Telegraph Co.	3,750 00	¹ Dismissed
662-A	American Telephone & Telegraph Co.	5,000 00	¹ Dismissed
2172-A	American Telephone & Telegraph Co.	500 00	¹ Dismissed
10110	American Wood Board Company, The	620 00	¹ Dismissed
1198-A	Amidon, John	150 00	\$65 00
14439	{ Amidon, John	{ 450 00 }	50 00
14643		{ 150 00 }	
13848	Amorose, Joseph & ano.	150 00	¹ Dismissed
1664-A	Amory, J. M. & Son...	710 90	710 90
1587-A	Amy, H. & Co. &c.	100 96	100 96
14113	Anderson, Benjamin & ano.	2,300 00	925 00
2643-A	Anthonson, Severin ...	200 00	¹ Dismissed
8581	Armstrong, Mary J...	405 00	² Dismissed
14154	Ash, Clinton D. & S. L. Murgittroyd	2,000 00	1,000 00
9511	Ash, R. H.	199 00	State

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
10864	Atlantic Gulf & Pacific Company	\$219 00	⁴ Dismissed
10865	Atlantic Gulf & Pacific Company	2,708 79	⁴ Dismissed
10866	Atlantic Gulf & Pacific Company	507 22	⁴ Dismissed
10867	Atlantic Gulf & Pacific Company	2,606 13	⁴ Dismissed
10868	Atlantic Gulf & Pacific Company	117 07	⁴ Dismissed
10869	Atlantic Gulf & Pacific Company	590 88	⁴ Dismissed
10870	Atlantic Gulf & Pacific Company	31,395 31	⁴ Dismissed
2451-A	Austin, Edward	320 00	\$35 00
2594-A	Babcock, Rushton & Co.	790 41	790 41
549-A	Baird, John	2,800 00	518 00
1031-A	Baker, Charles	1,373 99	1,373 99
2480-A	Baker, George F., Jr.	188 26	188 26
1894-A	Baker, Laura D., et al.	7,000 00	1,450 00
2731-A	Baker, Thomas	200 00	200 00
1845-A	Ballard & De Cordova.	808 50	808 50
2436-A	Ballou, Henry C.	10,035 00	6,120 00
14507	Ballou, Henry C.	300 00	100 00
14355	Ballou, Henry C., ind. &c	1,012 95	¹ Dismissed
14356	Ballou, Henry C.	623 00	¹ Dismissed
14357	Ballou, Henry C.	300 00	¹ Dismissed
14358	Ballou, Henry C.	56,833 04	¹ Dismissed
14507	Ballou, Henry C.	300 00	100 00
1433-A	Banaia, Pasquale	1,500 00	550 00
1783-A	Baring and Company.	1,093 03	1,093 03
2851-A	Barker, John F., & ano.	250 00	25 00
1850-A	Barnes Brothers	4,297 21	4,297 21

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1589-A	Barney, Charles D. & Co	\$5,947 93	\$5,947 93
1672-A	Barr & Hearn	443 09	443 09
6561	Barry, John & William.	350 00	350 00
1827-A	Bartlett, Frazier & Car- rington	4,425 21	4,425 21
1852-A	Baruch Brothers	2,398 47	2,398 47
14365	Base, Mary, et al.	1,006 50	225 00
1798-A	Batcheller & Ade	1,507 42	1,507 42
14285	Batt, George H.	2,500 00	¹ Dismissed
1264-A	Battle Island Paper Co.	8,345 94	² Dismissed
1491-A	Battle Island Power Co.	30,000 00	3,250 00
14229	Bayer, Charlotte, et al. .	945 00	¹ Dismissed
1656-A	Baylis & Co.	471 57	471 57
13913	Beal, Catharine, & ano.	903 80	400 00
1601-A	Bearns, J. S. & Co.	826 00	826 00
1439-A	Beckwith, Edmund L. .	550 00	25 00
2688-A	Beckwith, Edmund L. .	110 00	25 00
1183-A	Beckwith, M. Ely.	300 00	175 00
9974	Bedell, Harvey S.	500 00	100 00
9975	Bedell, Harvey S.	200 00	50 00
10575	Bedell, Harvey S.	100 00	25 00
10576	Bedell, Harvey S.	250 00	50 00
2138-A	Bedell, Helen C., ind., &c.	500 00	100 00
1872-A	Beekman, William B. & Co.	640 00	640 00
2530-A	Beeman, Malvina	25,030 00	3,500 00
2616-A	Beers & Owens.	191 00	191 00
890-A	Bellinger, Margaret . . .	1,384 75	¹ Dismissed
14175	Bellinger, Margaret . . .	1,384 75	¹ Dismissed
1727-A	Benedict, Drysdale & Co	1,168 87	1,168 87
1641-A	Benedict, L. L. & Co. . .	144 49	144 49
14554	Beneke, William	200 00	50 00
2003-A	Benkard, Harry H.	2,008 00	2,008 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
2004-A	Benkard & Stebbins...	\$390 09	\$390 09
1612-A	Benjamin, Ferguson & McMurty	3,380 92	3,380 02
634-A } 2635-A }	Bennett, Emeline D..	{ 750 00 } { 1,150 00 }	550 00
9558	Bennett, Lucy Dilts...	2,014 70	¹ Dismissed
788-A	Bennett, Marcus	554 15	375 00
1628-A	Benson, Cadwell B., et al	2,000 00	100 00
611-A	Benson, Helen C.....	10,000 00	4,900 00
2230-A	Benson, William J., & ano.	1,133 00	² Dismissed
1133-A	Bentley, Florence	1,000 00	⁵ Dismissed
1726-A	Berner, C. E. & Co....	2,295 20	2,295 20
10315	Betts, Clara P.....	232 00	50 00
2401-A	Biette, Alexandrena ...	223 00	100 00
1977-A	Bigelow, Otis M., as exec., &c.	2,589 00	¹ Dismissed
2770-A	Bigelow, Otis M., ind..	3,780 00	¹ Dismissed
2497-A	Bisnett, Joseph	141 50	141 50
1844-A	Bissell, R. H. & Co....	560 00	560 00
2775-A	Bissell, Willard G.....	231 10	¹ Dismissed
2618-A	Bd. of Edu. of Union Free School of Mechanicville	552 88	540 88
10586	Blaisdell, George M., & ano.	500 00	² Dismissed
14179	Blake Bros. & Co.....	212 92	212 92
1875-A	Block, Henry & Co....	1,408 20	1,408 20
1671-A	Blyth & Emmons.....	1,554 04	1,554 04
14320	Boak, George A., & ano.	650 00	181 50
2501-A	Bobenhausen, Adeline..	1,800 00	55 00
2850-A	Bogardus, Elmer	512 00	40 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁵ Dismissed upon stipulation because outlawed when filed.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1909-A	Bonbright, William P. & Co.	\$2,125 48	\$2,125 48
1002-A	Borg, Rosalie F.	1,839 76	1,804 12
1580-A	Borman & Co.	285 34	285 34
990-A	Bostwick, Thomas H. . .	7,104 50	4,000 00
2272-A	Bouton, Crawford	10,000 00	350 00
1630-A	Bouvier, M. C. & Co. . .	1,116 90	1,116 90
760-A	Bouvard, Eleanor E. . .	500 00	¹ Dismissed
13909	Bradley, Jennie Morgan	1,784 28	1,150 00
2563-A	Bradt, Maggie, & ano. .	10,212 50	3,787 00
14201	Bragg, John	500 00	100 00
14133	Braley, Byron B.	1,425 00	1,000 00
1650-A	Braman, Chester A. . . .	100,320 00	*
2776-A	Brandhorst, Christopher	900 00	350 00
8818	Bratt, Fred A., et al. . .	4,234 37	1,751 25
8819	Bratt, Fred A., et al. . .	12,059 00	2,282 40
8822	Bratt, Fred A., et al, &c.	9,065 85	⁴ Dismissed
1307-A	Brearton, James, exec., &c.	769 61	400 00
9559	Breed, Oliver C.	2,511 40	¹ Dismissed
14286	Brewer, James A.	400 00	130 00
13914	Brewster, E. Frank. . . .	2,497 43	1,500 00
13915	Brisbane, James	600 00	600 00
1766-A	Britton & Fiero.	1,085 68	1,085 68
6571	Britton, Rose Dillon. . .	5,000 00	500 00
10889	Brockport Gas Light Company	9,900 00	¹ Dismissed
1281-A	Brogan, William, & ano.	6,000 00	State
14237	Bronson, Mary	150 00	65 00
14262	Brophy, James P.	1,100 00	350 00
14551	Brower, F. Willard. . . .	1,388 50	578 00
14552	Brower, F. Willard. . . .	1,867 00	259 00
9952	Brown, Charles O.	2,500 00	800 00

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
9472	Brown, David	\$1,220 00	² Dismissed
10232	Brown, James N., et al.	341 00	\$100 00
2233-A	Brown, Jane L.	1,631 50	² Dismissed
8983	Brown, Jerry, & ano. . .	302 60	² Dismissed
10103	Brown, Joseph	240 00	² Dismissed
1712-A	Brown, Seneca D.	759 31	759 31
2423-A	Brown, Vernon C. & Co.	274 88	274 88
2412-A	Brown and Lowe Co. . .	11,523 47	4,500 00
2515-A	Brownlow, Mary E. . . .	10,192 00	1,652 00
2173-A	Buck, Thomas C. & Co.	1,567 19	1,567 19
1830-A	Buckhout, Davis & Co. .	1,282 97	1,282 97
1481-A	Buckles, Mary J., admr., &c.	2,643 75	State
10900	Buffalo, Lockport and Roch. R. R. Co.	500 00	⁴ Dismissed
13952	Bulger, Bridget Ann. . .	375 00	65 00
2564-A	Bullard, Charles M. . . .	2,666 66	¹ Dismissed
877-A	Bullard, Estelle C.	3,333 33	¹ Dismissed
402-A	Bullis, Abraham R. . . .	190 00	100 00
1010-A	Bunnel, Irving	3,152 60	3,152 60
8712	Burch, George	250 00	² Dismissed
8816	Burch George	252 60	² Dismissed
13821	Burch, Howard, et al. . .	1,033 00	700 00
8582	Burdick, Sebons E. . . .	470 00	² Dismissed
2636-A	Burgett, Ford S.	3,000 00	¹ Dismissed
14492	Burnett, Flora	150 00	50 00
1729-A	Burniston, George A. & Co.	272 70	272 70
1506-A	Burr, James S.	196 00	140 00
2072-A	Burr, James S.	196 00	140 00
2777-A	Burr, James S.	196 00	140 00
1963-A	Burras, H. K. & Co. . . .	894 68	894 68
14155	Burrell, David H., et al.	3,000 00	95 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1728-A	Burrill & Stitt.....	\$761 28	\$761 28
2595-A	Burrows, George L....	300 00	¹ Dismissed
1950-A	Burt, Alice M.....	4,881 75	750 00
14143	Burt Olney Canning Co.	100 00	75 00
14430	Butler, Bertha L.....	200 00	150 00
940-A	Butterfield, Fred R....	1,281 00	State
1662-A	Byrne & McDonnell...	1,024 42	1,024 42
1093-A	Byrnes, Michael	2,470 00	925 00
1136-A	Byrnes, Michael	1,845 00	State
1780-A	Cahn, Frank B. & Co..	2,456 20	2,456 20
1895-A	Cala, Carmelo, & ano..	725 00	125 00
2710-A	Calarco, Domenico, & ano.	3,000 00	250 00
2709-A	Calarco, Tony, et al....	2,600 00	150 00
2422-A	Cammann & Company.	341 68	341 68
14410	Comodica, Michael	1,250 00	287 50
2019-A	Carey, H. T. & Co.....	359 22	359 22
1675-A	Carpenter, N. L. & Co.	3,035 15	3,035 15
8943	Carswell, Nathaniel ...	1,100 00	² Dismissed
1663-A	Carter, Wilder & Co...	343 15	343 15
2720-A	Cary, Thomas H.....	472 00	275 00
14499	Casaretti, Charles, & ano	1,250 00	75 00
14610	Casaretti, Nicholas	750 00	100 00
313-A	Casey, James, ind., &c.	1,504 50	⁴ Dismissed
2576-A	Casey, James, ind., &c.	1,504 50	115 00
1057-A	Casler, Martha H., et al	800 00	225 00
1058-A	Casler, P. W. Co. Inc..	1,000 00	¹ Dismissed
1902-A	Caspary, Alfred H....	2,700 07	2,700 07
1651-A	Cast Thread Fitting & Foundry Company ..	335,919 21	*

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1614-A	Cates, Henry A., et al..	\$10,560 00	\$2,119 00
1615-A		500 00	
1616-A		1,200 00	
2479-A	Central Dredging Com- pany	104,085 99	20,000 00
1172-A	Central N. Y. Gas & Elec. Co.....	1,197 59	1,073 57
1201-A	Central N. Y. Gas & Elec. Co.....	15,318 44	14,592 13
1253-A	Central N. Y. Gas & Elec. Co.....	2,545 69	559 70
1254-A	Central N. Y. Gas & Elec. Co.....	524 52	262 28
2533-A	Central N. Y. Gas & Elec. Co.....	59,479 00	³ Dismissed
14423	Chalker, Maude S....	125 00	¹ Dismissed
1730-A	Chapin, S. B. & Co....	7,891 86	7,891 86
2778-A	Chapman, Emma C. H. & ano., &c.....	200 00	¹ Dismissed
13987	Chapman, Emma C. H., & ano.	101 20	¹ Dismissed
1953-A	Chapman, Elverton R..	2,476 61	2,476 61
2174-A	Chapman & Seaman...	2,355 08	2,355 08
10591	Chase, Alice H.....	360 00	² Dismissed
14452	Chase, Carrie E., as adm., &c.....	125 00	100 00
2226-A	Chatt, August	300 00	150 00
9226	Chauncey, George G...	20,000 00	1,000 00
13861	Chesley, Earl & Heim- bach	2,172 76	1,832 62
1826-A	Chislom, Edward de Clifford, et al.....	938 39	938 39
141-A	Christian, Joseph	5,000 00	450 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

³ Dismissed upon stipulation.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
2201-A	Christler, F. B. & ano.	\$1,800 00	\$573 78
1437-A	Chubb, Albert J.	1,200 00	40 00
2689-A	Chubb, Albert J.	170 00	30 00
10698	Church, George H.	8,004 50	¹ Dismissed
10447	Church of St. John the Evangelist, Spencerport, N. Y.	6,385 00	500 00
2593-A	Ciesielski, Joseph, et al.	1,001 50	500 00
10719	Clark, George H.	3,318 50	¹ Dismissed
10599	Clark, John H.	5,184 16	300 00
2592-A	Clark, Lewellen	801 50	250 00
2499-A	Clark, Matthew	800 00	50 00
1877-A	Clark, Dodge & Co.	1,179 41	1,179 41
2106-A	Clary, Thomas, et al. ...	573,803 03	25,000 00
1004-A	Cleary, Louis	4,000 00	200 00
2215-A	Clement & Whitney. ...	774 12	774 12
2728-A	Cleveland and Sons Company	3,096 98	3,066 94
1731-A	Clews, Henry & Co.	2,143 92	2,143 92
13867	Clover Farms, Inc.	51 50	25 00
345-A	Clute, James S.	18,300 00	¹ Dismissed
10756	Cobb, Cullen R. & ano.	1,500 00	¹ Dismissed
8953	Cody, James F.	515 00	165 00
2649-A	Coffin, Robert O.	4,371 50	3,250 00
9895	Cohen, Frank L.	8,026 80	Dismissed
1756-A	Cohen, Frank L.	4,564 06	3,104 06
2066-A	Cohen, William W.	1,063 50	1,063 50
2065-A	Cohen, Greene & Co. ...	291 40	291 40
2813-A	Colgate, Hoyt & Co.	157 60	157 60
993-A } 1381-A }	Collier, John A.	{ 800 00 } { 600 00 }	450 00
581-A	Colts, George	103 00	² Dismissed
2674-A	Columbia Distilling Co.	125,000 00	State
1659-A	Combs, A. H. & Co.	1,001 50	1,001 50

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
2697-A	Conley, Mary L.....	\$7,500 00	\$5,500 00
8583	Conley, William	1,660 00	² Dismissed
13827	Connell, Mary Ellen...	804 88	¹ Dismissed
14240	Connor, Thomas, et al..	960 00	⁴ Dismissed
1578-A	Content, H. & Co.....	10,703 05	10,703 05
691-A	Cook, Benjamin R.....	150 00	⁵ Dismissed
14384	Cook, Benjamin R....	150 00	100 00
10455	Cook, Fred	540 00	155 00
14283	Cook, Nathaniel, et al..	350 00	225 00
1495-A	Cookingham, Henry J.	450 00	125 00
1496-A		100 00	
1497-A		100 00	
1498-A		100 00	
14395	Corcoran, Gerald H., ind., &c.....	2,007 90	² Dismissed
14382	Corcoran, James W., ind	2,000 00	1,000 00
13911	Cornell, Willis	1,200 00	80 00
14525	Cornell, Willis	300 00	77 50
1667-A	Cornwell, John W.....	151 00	151 00
1848-A	Crawford, Patton & Can- non	645 52	645 52
1036-A	Crear, David	43,890 00	¹ Dismissed
1037-A	Crear, David	775 80	¹ Dismissed
1038-A	Crear, David	2,925 00	¹ Dismissed
1039-A	Crear, David	38,121 00	¹ Dismissed
2810-A	Crowley, John	400 00	340 00
10883	Crump, Shelley G.....	3,000 00	¹ Dismissed
322-A	Crump, Shelley G.....	3,200 00	⁴ Dismissed
1032-A	Currie, Samuel G.....	3,250 50	3,249 60
1962-A	Currie, Markle & Co...	1,613 09	1,613 09
10450	Curtis, Seymour H....	6,347 00	3,500 00
2701-A		12,946 00	
1749-A	Cutting & Co.....	671 25	671 25

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

⁵ Dismissed upon stipulation because outlawed when filed.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1340-A	Czachorowski, Anna, et al.	\$600 00	\$450 00
14344	Daly, Helen	6,413 40	¹ Dismissed
942-A	Daly, James C.	600 00	State
9398	Daly, Patrick J.	4,821 95	⁴ Dismissed
1438-A	Dann, Jay B.	2,500 00	100 00
2693-A	Dann, Jay B.	900 00	125 00
1718-A	Darvoe, Simeon A.	500 00	² Dismissed
14574	Dauchy, Oscar W.	200 00	100 00
14129	David, Alice M. A.	200 00	40 00
2290-A	Davies, Marion	68,445 00	18,792 15
10716	Davis, Mary A.	2,004 50	100 00
1842-A	Davis, John H. & Co.	184 29	184 29
1658-A	Davis, J. W. & Co.	589 34	589 34
2130-A	Day & Heaton.	770 00	770 00
10718	Dayton, David H.	9,579 50	¹ Dismissed
10028	Dean, Fordyce O.	1,100 00	300 00
1669-A	de Billier & Co.	1,312 00	1,226 00
10564	Debottis, Frank	10,000 00	State
2460-A	Decker, William	2,000 00	State
14238	Deedy, Richard, & ano.	550 00	400 00
10725	Defendorf, Fletcher A., & ano.	3,304 50	¹ Dismissed
2243-A	De Forest, Lucy, et al.	1,700 00	150 00
1742-A	Degener & Burke.	476 71	476 71
865-A	De Graff, Alfred.	100 00	60 00
864-A	De Graff, Alfred, & ano.	637 75	¹ Dismissed
968-A	De Groot, Henry	200 00	50 00
1772-A	Dehaven & Townsend.	3,489 78	3,489 78
1042-A	De Kay, Eckford C.	1,399 76	1,399 76
10884	Demarest, David M.	200 00	² Dismissed
10701	Demont, Alice	3,000 00	¹ Dismissed
2380-A	Demont, Sarah J., et al.	125 00	30 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1275-A	Denno, Louis	\$300 00	\$175 00
10088	Derrick, George	1,529 50	¹ Dismissed
14404	Des Francs, Yvan Marie Albert	200 00	180 00
2143-A	De Witt, Charles H. & Co.	147 50	147 50
1475-A	Di Caprio, Ralph.	500 00	300 00
1476-A	Di Caprio, Ralph.	375 00	175 00
1333-A	Dicker, Celia M., et al.	800 00	¹ Dismissed
1332-A	Dicker, Edgar L.	800 00	375 00
2159-A	Dickinson, William H.	250 62	250 62
2262-A	Dill, Ida A., & ano. . . .	10,000 00	¹ Dismissed
9557	Dilts, Bessie Smith. . . .	1,513 95	¹ Dismissed
10188	Diver, George H., et al.	1,000 00	¹ Dismissed
1812-A	Dominick & Dominick. .	3,123 76	3,082 48
14453	Donnelly, Mary	125 00	100 00
2566-A	Donovan, Daniel	57 68	40 00
14383	Donovan, George E. . . .	2,000 00	¹ Dismissed
2605-A	Dougall, Frances J. . . .	500 00	25 00
10236	Dounce, Clifford B. . . .	185 00	³ Dismissed
13858	Doyle Brick Company.	2,000 00	1,000 00
2498-A	Dreer, Gilbert, & ano. . .	520 00	25 00
8584	Drummond, James Jr. . .	364 00	² Dismissed
14245	Dunkirk Construction Co.	10,700 68	5,352 90
1709-A	Du Val, Greer & Co. . . .	73 88	73 88
9012	Dwyer, John E.	740 00	² Dismissed
2119-A	Earl, Frank R.	25 00	State
2494-A	Eddy, Arthur M., & ano	601 50	300 00
10239	Eddy, Florence M.	537 95	175 00
2291-A	Edey, Brown & Sander- son	964 89	964 89

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

³ Dismissed upon stipulation.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1896-A	Ettingham Lawrence & Co.	\$1,721 14	\$1,721 14
1632-A	Elias, Albert J. & Co..	1,756 95	1,756 95
1622-A	Ellinger, Max	543 81	543 81
2725-A	Ellis, Erna	510 00	State
2582-A	Ellis, Frank W.	1,042 55	415 00
1773-A	Elwell, Wilmot P., & ano.	72,487 15	³ Dismissed
1262-A	Elwood, William C. . . .	11 50	² Dismissed
1383-A	Emens, Lilla Alice. . . .	180 00	75 00
2221-A	Emerson, Clara	7,000 00	2,500 00
2220-A	Emerson, John Lynn..	3,633 60	882 50
1823-A	Empire Engineering Corporation	52,335 95	34,503 87
358-A	Empire Equipment Co.	3,086 50	¹ Dismissed
14426	Erie Railroad Co.	225,000 00	¹ Dismissed
957-A	Errgong, Lizzie M.	2,330 12	¹ Dismissed
764-A	Facer, William	2,862 50	¹ Dismissed
13879	Fagan, James, as adm., &c.	90 00	State
13880	Fagan, James, & ano. . .	160 00	State
14445	Fagan, James, & ano. . .	90 00	66 00
14446	Fagan, James, as adm..	75 00	50 00
2100-A	Fahnestock & Co.	832 90	832 90
2667-A	Fairchild, Charles & Co	3,357 90	3,348 00
2584-A	Fanck, Rosena	10,000 00	¹ Dismissed
673-A	Fanck, Rosena	6,000 00	¹ Dismissed
610-A	Fanck, Rosena	10,300 00	¹ Dismissed
10826	Farrell, Catharine	400 00	⁴ Dismissed
837-A	Farrell, Catharine, et al	400 00	⁴ Dismissed
14104	Farrell, Catharine	400 00	85 00
9754	Fee, Amelia	3,189 00	972 90

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

³ Dismissed upon stipulation.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
13951	Fellows, Hannah and Adrian	\$9,298 00	¹ Dismissed
1743-A	Fellowes, Davis & Co...	1,717 99	\$1,717 99
2288-A	Fetterley, Andrew	1,242 50	State
1744-A	Feuchtwanger & Co....	3,101 05	3,101 05
1137-A	Field, William L....	1,800 00	1,700 00
9504	Fineour, John, Jr....	125 50	² Dismissed
10893	Fishbaugh, Frank L...	6,709 50	900 00
2734-A	Fisher, William	2,200 00	¹ Dismissed
2634-A	Fitzgerald, Thomas Co.	3,704 37	2,389 06
14514	Flanigan, Eugene D...	3,166 61	3,166 61
2531-A	Flood & Van Wirt Co..	13,744 51	5,518 16
9664	Flume, George	9,000 00	¹ Dismissed
2537-A	Flushing Bay Develop- ment Co.	278,750 00	¹ Dismissed
10745	Fogarty, Maria	3,300 00	400 00
14225	Follett, David S. & Fred D.	200 00	¹ Dismissed
1227-A	Ford, Albert H....	4,160 83	State
10898	Ford, William T....	285 00	¹ Dismissed
437-A	Forderkunz, Jennie ...	7,000 00	1,700 00
2265-A	Fort Edward Company, The	1,500 00	250 00
1732-A	Foster & Adams....	755 10	755 10
2341-A	Foster & Lounsbery....	3,144 29	3,144 29
2829-A	Fowler, Cortland F., & ano.	1,500 00	450 00
13800	Fowler, Frank	344 30	200 00
13864	Frame, Wm. L....	200 00	100 00
320-A	France, Andrew L....	5,450 00	2,000 00
2654-A	Frankfort Coal & Feed Co.	400 00	205 00
14367	Frankfort, Village of..	350 00	¹ Dismissed
9512	Franks, A. D....	188 00	State

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
2028-A	Friedlich, Katie	\$84 48	\$70 00
1647-A	Fritz, M. & Henry W. Douglas, trustee	113,516 68	*
1007-A	Gallagher, William G. . .	1,601 04	1,604 04
639-A	{ Gardner, Georgiana, &	{ 302 25 }	750 00
1211-A	{ ano.	{ 1,713 75 }	
2396-A	Garrison, Fred B.	1,435 00	² Dismissed
713-A	Garrison, Thomas R. . . .	3,100 00	¹ Dismissed
2822-A	Garvey, Joseph	106 00	¹ Dismissed
380-A	Garvin, Margaret Root. . .	2,275 00	1,750 00
1636-A	Gatcomb, James Y.	40,200 00	12,834 00
2717-A	Gelett, Joseph, & ano. . .	1,100 00	State
386-A	Genesee Valley Term. R. R. Co.	387,908 25	¹ Dismissed
2343-A	Gilbert, Frank W.	194 30	² Dismissed
2251-A	Gillespie, Fred G.	2,600 00	² Dismissed
14560	Gillette, Chauncey	120 00	20 00
2508-A	Gillette, Fred E., ind., &c.	7,250 00	190 00
10116	Gipp, Louis	2,500 00	350 00
14189	Glass, Edgar P., et al. . .	30,127 10	1,500 00
1559-A	Glenville, Town of.	1,000 00	1,000 00
1560-A	Glenville, Town of. . . .	100,000 00	7,000 00
1988-A	Goadby, W. H., & Co. . . .	505 09	505 09
2496-A	Goble, Joseph H., et al. . .	50,257 45	17,000 00
10435	Godfrey, Reed	156 00	85 00
10709	Goetz, George	1,045 20	¹ Dismissed
1595-A	Goldschmidt, H. P., & Co.	748 94	748 94
1784-A	Goodbody & Company. . . .	491 11	491 11
10077	Goodwin, Franklin N. . . .	1,000 00	474 00

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
10891	Gould, Charles W., & ano.	\$5,061 00	⁴ Dismissed
14354	Gould, Elsie A.	150 00	\$75 00
9128	Graham, Ann	787 00	² Dismissed
1770-A	Graham, J. L., & Co.	125 76	125 76
2246-A	Grannis & Lawrence.	809 12	809 12
14178	Graves, Manbert, George & Co.	2,731 61	2,000 00
14322	Green, Anna L.	2,000 00	300 00
445-A	Greene, Margaret E.	400 00	125 00
117-A	Gregg, David	2,500 00	¹ Dismissed
2718-A } 14508 }	Grell, Fred H.	{ 11,000 00 } { 11,000 00 }	1,000 00
1673-A	Griesel & Rogers.	454 00	454 00
1980-A	Griffen, Michael	4,000 00	⁴ Dismissed
969-A	Griffin, John, et al.	200 00	75 00
14282	Griffin, Susie	2,200 00	1,500 00
4077	Groat, Lewis W. V.	600 00	¹ Dismissed
14431	Groat, William J., et al	150 00	60 00
2120-A	Groesbeck & Co.	203 28	203 28
2381-A	Gros, Nancy M., et al.	2,505 80	¹ Dismissed
1874-A	Gross & Kleeberg.	2,456 54	2,456 54
9481	Guerin, John, & ano.	472 88	263 25
943-A	Guerin, John	770 00	State
2569-A	Gumpert, Chester Arthur	1,018 40	1,018 40
10234	Gunnell, William J.	329 52	² Dismissed
10109	Guyer, Freeman, as adm., &c.	1,500 00	¹ Dismissed
970-A } 1762-A }	Hagaman, S. Wallace.	{ 5,200 00 } { 15,400 00 }	1,020 00
14185	Hall, Mary F. V.	2,000 00	600 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1623-A	Halle & Stieglitz.....	\$5,245 66	\$5,245 66
1733-A	Hallgarten & Co.....	1,259 97	1,259 97
10209	Hallinan, Patrick, & ano	1,400 00	1,400 00
2002-A	Halsey, C. D. & Co....	562 78	562 78
1841-A	Halsey & Hudnut.....	409 62	409 62
2121-A	Halsted, E. Bayard....	1,684 88	1,684 88
946-A	Hammond, Charles F..	10,550 00	¹ Dismissed
1482-A	Hanington, William J., & ano.	715 00	40 00
914-A	Hanrahan, John	175 00	State
13912	Harrington, Almon, as comm.	900 00	24 00
14561	Harrington, Almon, as comm.	70 00	30 00
1846-A	Harris & Fuller.....	919 94	919 94
9285	Hartley, John R.....	125 00	40 00
9284	Hartley, Martin I., et al.	125 00	² Dismissed
14284	Hartman, Mary, et al..	1,116 60	350 00
1586-A	Hartshorne & Battelle..	269 66	269 66
8316	Hartupee, William D..	12,500 00	² Dismissed
754-A	Harvey, John	12,001 50	4,600 00
1801-A	Hatch, W. T., & Sons..	125 95	125 95
10514	Hatfield, Rachael	620 00	Dismissed
2458-A	Havert, Isaac	120 00	25 00
13855	Hawthorne, Nathaniel..	1,200 00	110 36
1794-A	Hayden, Stone & Co...	17,424 96	17,424 96
1075-A	Haynes, Emma R., et al.	3,000 00	1,650 00
1889-A	Haywood, Fred M.....	100 00	State
1857-A	Head, Charles & Co...	12,936 94	12,936 94
2413-A	Heid, Anna Maria.....	1,000 00	Dismissed
2414-A	Heid, Michael	1,600 00	² 75 00
2415-A	Heid, Michael, & ano...	1,044 50	200 00
682-A	Hemingway, H. C., & Co	1,500 00	525 00
692-A	Hemingway, H. C., & Co	150 00	25 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1912-A	Henderson, Rufus A...	\$4,500 00	¹ Dismissed
1707-A	Henderson & Co.....	287 33	\$287 33
2807-A	Hendrickson - McCabe Construction Co., Inc.	15,522 19	7,500 00
1076-A	Henley, Louis	10,000 00	* 600 00
14111	Henley, Louis	3,325 00	¹ Dismissed
2732-A	Hennessy, William J...	2,148 60	489 72
2663-A	Henry, Charles H.....	2,500 00	700 00
8715 } 9023 }	Henry, George A.....	{ 300 00 } { 200 00 }	150 00
916-A	Henry, George	600 00	State
1613-A	Henry Brothers & Co..	370 39	370 39
1992-A	Henry & Matthews....	850 00	715 10
541-A	Herkimer, County of..	2,227 72	² Dismissed
1850-A	Herman, Frederick J..	251 42	167 42
1782-A	Herrick, Berg & Co....	1,893 83	1,893 83
2613-A	Herrick, Hicks & Colby.	847 56	847 56
1768-A	Herzfield, Felix, et al..	1,600 22	1,600 22
1665-A	Herzog & Glazier.....	763 72	763 72
2743-A	Hickey, Alice	500 00	125 00
10316	Hickey, Alice	220 00	60 00
2742-A	Hickey, John	500 00	85 00
13927	Highland Solar Salt Co.	560 00	175 00
2234-A	Hiler, Dora W., & ano.	1,650 50	² Dismissed
2235-A	Hiler, Dora W., & ano.	1,510 00	² Dismissed
1272-A	Hilfinger, Alex., & ano.	1,000 00	350 00
2044-A	Hilfinger, Alex., et al.	1,400 00	400 00
2815-A	Hillman, Frank H.....	836 00	731 00
2449-A	Hinckley, Arthur	160 00	50 00
2750-A	Hinckley & Grant Tele- phone Co.	1,500 00	301 45

* The award is claim No. 1076 covers only a portion of the claim. Balance to be covered by contract of settlement.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1312-A	Hinckley Fibre Co.	\$1,216,832 78	\$175,000 00
2779-A		1,200,000 00	
2780-A		16,832 78	
2781-A		1,000,000 00	
2811-A	Hinds, Charles	1,975 00	340 00
451-A	Hinkston, Jeannette G.	2,575 00	² Dismissed
1829-A	Hogue, Charles	2,129 95	2,129 95
14246	Holladay, John, & ano.	137 60	¹ Dismissed
2196-A	Hollins, H. B., & Co.	1,424 45	1,424 45
2827-A	Holly, Zada, et al.	500 00	200 00
2141-A	Homans & Co.	132 00	132 00
1557-A	Hood, Charles N.	211 40	State
1661-A	Hooley, Edwin S., & Co.	7,238 74	7,238 74
1818-A	Hooper, T. D., & Co.	1,270 80	1,270 80
1858-A	Hopkins Brothers	203 97	203 97
1660-A	Hopkins, George B., & Co.	1,373 84	1,373 84
1723-A	Hornblower & Weeks.	7,461 98	7,461 98
1750-A	Horton, H. L., & Co.	1,210 77	1,210 77
2250-A	Hotchkiss, Emma D.	2,000 00	250 00
1897-A	Hotchkiss, Henry D.	443 77	443 77
14127	Hotchkiss International Prize Medal Essential Oil Co., The H. G.	200 00	50 00
14128	Hotchkiss International Prize Medal Essential Oil Co., The H. G.	200 00	200 00
1627-A	Housman, A. A., & Co.	1,907 51	1,907 51
99-A	Hovey, Herbert	600 00	⁴ Dismissed
102-A	Hovey, Treat J.	550 00	⁴ Dismissed
1740-A	Hudson, C. L., & Co.	7,479 10	7,479 10
2730-A	Hughes, Margaret	914 50	125 00
1711-A	Huhn, Edey & Co.	1,304 60	1,282 60

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1480-A	Hull, Arthur B.	\$3,298 00	\$1,048 00
2092-A	Humbert, E. C., & Son.	763 55	763 55
1886-A	Humburch, John H.	700 00	50 00
10427	Hunt, Charles B.	3,320 00	¹ Dismissed
2502-A	Huntley, Chauncey W..	1,200 00	60 00
2150-A	Hurd, Louise C., ind., &c	6,503 40	¹ Dismissed
2151-A	Hurd, Louise C., ind., &c	6,401 70	¹ Dismissed
2252-A	Hurlburt, William E..	19,329 60	10,000 00
2814-A	Hurley, Jeremiah	196 50	152 50
10527	Husband, Clara B., et al	75,000 00	21,663 00
2500-A	Hutchinson, Constant E.	1,800 00	85 00
2091-A	Hutton, E. F., & Co.	5,199 92	5,199 92
1984-A	Hyde, W. T., & Co.	452 92	452 92
10854	Hynes, George S.	1,200 00	⁵ Dismissed
2716-A	Hynes, George S.	1,200 00	700 00
1989-A	Imbrie, William Morris, & Co.	522 06	522 06
7932	Indian Lake, Town of.	1,842 00	State
2672-A	Industrial Distilling Co.	200 00	State
8028	Ingalls, Charles W.	28,334 91	² Dismissed
10619	Ingalls Stone Co.	1,770 58	State
10218	International Railway Co., et al.	9,566 24	¹ Dismissed
10219	International Railway Co., et al.	13,680 00	¹ Dismissed
10220	International Railway Co., et al.	250 00	¹ Dismissed
2117-A	International Railway Co., et al.	1,000 00	¹ Dismissed
2751-A	Irving, Jay, as exec., et al.	1,427 50	¹ Dismissed
10750	Irwin, James H.	3,000 00	¹ Dismissed
10820	Isler, Benjamin	400 00	¹ Dismissed

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁵ Dismissed upon stipulation because outlawed when filed.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
10817	Isler, Benjamin, et al..	\$300 00	¹ Dismissed
1649-A	Ivory Button Manufacturing Co.	436,000 00	*
2729-A	Jackway, David V., et al	402 80	¹ Dismissed
13808	Jennings, John	1,436 00	\$650 00
996-A	Jermain, Maria C.....	6,492 70	1,500 00
1710-A	Jewett Brothers	846 50	846 50
13908 } 14528 }	Johnson, Arthur M....	{ 4,250 00 } { 850 00 }	262 00
1834-A	Johnson, Byron F.....	4,025 00	² Dismissed
2830-A	Johnson, Garrett V....	5,000 00	State
2831-A	Johnson, Mary J.....	5,000 00	500 00
1441-A	Johnson, Newton	175 00	35 00
2690-A	Johnson, Newton	150 00	25 00
406-A	Johnson, Willis E., et al.	1,700 00	776 00
14239	Johnston, Mary E., et al.	100 00	50 00
446-A	Jones, Marvin A.....	290 00	210 00
14190	Jones, Thomas	394 00	203 60
2157-A	Judson, Henry I.....	250 46	250 46
9480	Kalbfleisch, Theodore F.	21,467 68	5,955 57
5839	Kearney, Sarah M., & ano.	4,000 00	200 00
8188	Kearney, Sarah M., & ano.	1,373 99	² Dismissed
1155-A	Kearney, Sarah M., et al	3,870 00	700 00
1448-A	Kearney, Sarah M., et al	4,000 00	200 00
683-A	Keck, Florence M.....	1,000 00	¹ Dismissed
647-A	Keck, Florence M., ind., &c.	5,600 00	¹ Dismissed
948-A	Kellehar, Michael, et al.	4,028 60	¹ Dismissed
8586	Keller, Alfred	477 00	² Dismissed
8585	Keller, Burton A.....	205 00	² Dismissed
10297	Kelley, Mary A., et al..	260 00	110 00

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1813-A	Kelley, Howell & Co...	\$1,070 55	\$1,070 55
9513	Kelly, Elbridge	199 00	² Dismissed
1368-A	Kelly, John S.	7,000 00	950 00
2683-A	Kelly, Sidney J., et al..	1,000 00	250 00
2696-A	Kelly, Sidney J., et al..	650 00	275 00
1366-A	Kennedy, Emma	2,065 00	1,000 00
13758	Kennedy, Margaret	420 00	150 00
2142-A	Kerr & Co.	1,103 14	1,103 14
2484-A	Kerwin, Julia, admr., etc.	25,000 00	1,700 00
1745-A	Kidder, A. M., & Co...	396 30	396 30
2257-A	Kilbourn, George W...	4,940 00	1,800 00
413-A	Kilts, George C., & ano.	2,400 00	1,300 00
1900-A	Kimball, R. J., & Co...	312 15	312 15
2139-A	Kindermann, Julius, & Sons	1,324 00	² Dismissed
14454	King, Robert	125 00	100 00
13965	King, Sarah	100 00	100 00
2296-A	Kinne, J. Irving, et al..	2,000 00	175 00
14335	Kirkman, Annie E., et al	500 00	400 00
13878	Klafehn, Wm. J., & ano.	125 00	State
14447	Klafehn, Wm. J., et al.	100 00	75 00
765-A	Kleinmeier, Charles F.	313 05	313 05
766-A	Kleinmeier, Mabel	5,000 00	3,500 00
2492-A	Kline, Andrew L.	74 23	² Dismissed
14288	Klingenschmitt, Alma, & ano.	986 80	¹ Dismissed
2445-A	Klock, Augustus	1,704 00	850 00
14530	Klotz, John A.	1,600 00	130 00
2416-A	Klotz, William	675 00	90 00
1600-A	Knauth, Nachod & Kuhne	2,297 90	2,297 90
2455-A	Kneut, Peter	850 00	400 00
2209-A	Knight, Horace W....	100,000 00	3,000 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1279-A	Konner, Victoria	\$7,500 00	\$2,200 00
1863-A	Kramer, Jacob	22 00	22 00
1000-A	Kramer, William C.	11,860 00	1,100 00
1840-A	Kraus Bros. & Co.	317 38	317 38
2105-A	Kreag, J. Adam.	100 00	50 00
1095-A	Krusemark, Charles, & ano.	1,229 05	⁴ Dismissed
2540-A	Krusemark, Charles, & ano.	1,229 05	614 73
8722	Kyser, David J.	200 00	² Dismissed
1837-A	La Blanc, Beatrice.	5,000 00	Dismissed
2160-A	Ladenburg, Thalmann & Co.	3,302 66	3,302 66
82-A	Lamb, Jessie M.	1,215 00	⁴ Dismissed
10311	Lampmann, Carrie A.	152 00	45 00
1639-A	Lancaster & Co.	4,741 41	4,741 41
54-A	Lannan, James	137 00	⁴ Dismissed
13754	Lannan, James	200 00	60 00
2738-A	Lanning, Thomas	2,600 00	55 00
1763-A	Lansburgh Bros.	1,409 18	1,409 18
2020-A	Lapsley, David, & Co.	20 00	20 00
1543-A	Lasher, Anna J., et al.	191 00	115 00
1544-A	Lasher, Anna J., et al.	150 00	75 00
1635-A	Lasher, Mary, et al.	4,000 00	1,496 00
1700-A	Lauer, Wm. E., & Co.	955 63	955 63
8587	Lauther, Thomas W.	236 00	² Dismissed
2175-A	Lawrence, Cyrus J., & Sons	242 66	242 66
1864-A	Lawrence, Edward B.	150 00	150 00
14200	Laycock, Richard W.	500 00	200 00
2568-A	Lazelle, Matthews & Co.	1,737 90	1,737 90
2122-A	Leask, George, & Co.	137 34	137 34
1838-A	Le Blanc, David, & ano.	575 00	175 00

² Dismissed for want of prosecution.⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
10201	Lee, Charles R., exec., &c.	\$3,500 00	\$2,000 00
13842	Lehigh Valley Railway Co.	87,634 00	30,000 00
13843		3,749 00	
13844		2,113 00	
227-A	Leiter, Grace L.	141 25	125 00
1588-A	Leopold, James M., & Co	1,480 85	1,480 85
1389-A	Lepper, Silas	95 00	State
1959-A	Le Roy, Rose C.	10,000 00	State
51-A	Le Valley, John.	53,305 00	⁴ Dismissed
10878	Le Valley, John.	53,305 00	⁴ Dismissed
10879	Le Valley, John.	1,500 00	⁴ Dismissed
14386	Levedusky, Edward . . .	500 00	100 00
339-A	Levengston, Harry M..	125,000 00	⁶ Dismissed
2700-A	Leverett, George V. . . .	6,000 00	1,250 00
1964-A	Levy Brothers	404 66	404 66
1847-A	Levy, L., & Co.	1,874 70	1,874 70
14533	Lewis, Gertrude	825 00	175 00
2620-A	Lewis, Mary L., & ano.	557 70	¹ Dismissed
1592-A	Liddle, Anna R.	2,500 00	¹ Dismissed
14176	Light, William A.	500 00	175 00
2456-A	Lindstrom, Conrad E..	963 33	310 00
2825-A	Linendoll, Jane A.	200 00	¹ Dismissed
1751-A	Lipper, Arthur, & ano..	4,009 72	4,009 72
1708-A	Lloyd & Company.	661 00	661 00
2147-A	Lockwood, F. M., & Co.	420 99	420 99
1920-A	Loeb, Albert, & Co.	1,802 06	1,802 06
2284-A	Logan & Bryan.	1,617 82	1,617 82
2166-A	Logothates, Arthur	2,421 00	400 00
1405-A	Lohr, Aaron B., & ano..	1,100 00	100 00
10746	Loomis, Arthur M.	2,100 00	¹ Dismissed
13881	Lorback, John	60 00	State
13964	Lorback, John	150 00	100 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

⁴ Dismissed on stipulation because duplicate claim.

⁶ Dismissed on account of settlement of claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14448	Lorback, John	\$125 00	\$100 00
10451	Losey, Frank, et al. . . .	190 00	40 00
14563	Lucas, Rollin H.	60 00	40 00
2006-A	Lummis & Parsons. . . .	317 65	317 65
10191	McArthur, Nora	250 00	¹ Dismissed
9673	McCarthy, Charles	2,375 00	² Dismissed
13753	McCarthy, D. T., & Sons.	550 00	¹ Dismissed
13863	McClees, Emma J.	5,000 00	¹ Dismissed
1008-A	McCormack, John L. . . .	1,518 86	1,518 86
2784-A	McCreery, Clarence A. . .	8,000 00	6,000 00
1096-A	McDermott, Wm. P. A. . .	3,485 35	State
1178-A	McDonald, Charles E., as adm.	50,000 00	12,000 00
1821-A	McDonald, John A.	500 00	¹ Dismissed
2375-A	McGovern, P., & Co. . . .	17,337 37	17,056 21
1885-A	McInerney Realty Co. . .	1,000 00	50 00
13967	McIntyre, T. A., & Co. . .	2,618 26	2,618 26
2768-A	MacArthur Bros. Co. & Lord Electric Co.	54,141 91	12,360 43
893-A	Mack, Charles A.	1,362 00	1,000 00
2144-A	Mackey & Co.	790 20	790 20
13954	Madden, Mary A.	300 00	65 00
14244	Mahoney, John	185 44	State
1652-A	Maier, Fred, & Sons. . . .	143,648 42	*
640-A	Maitland, Coppell & Co. .	502 12	502 12
2539-A	Malcom & Coombe.	1,948 01	1,948 01
1199-A	Maltby, Herman	120 00	104 00
13907	Maltby, Herman	360 00	32 50
14564	Maltby, Herman	97 50	32 50
1911-A	Manice, Edward A.	938 66	938 66
1799-A	Manice, E. A., & Co. . . .	206 52	206 52
1767-A	Manson, Thomas L., & Co.	3,228 58	3,228 58

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1335-A	Marcellus & Otisco Lake Ry. Co.	\$3,556 11	\$2,508 11
1282-A	Margolis, Max	99 50	² Dismissed
10832	Mark, Angelo	540 00	² Dismissed
13882	Marsh, Susie M.	115 00	State
14449	Marsh, Susie M.	90 00	60 00
2080-A	Martin, W. Schenck, et al	3,715 00	1,810 00
2614-A	Martin & Co.	135 64	135 64
2733-A	Martz, Elmer	4,768 20	238 75
2615-A	Marx & Metz.	322 26	322 26
13762	Maryland Dredging & Contracting Co.	83,172 24	⁴ Dismissed
13815	Maryland Dredging & Contracting Co.	83,172 24	27,500 00
2397-A	Maury, C. W., & Co.	400 00	400 00
1734-A	Maxwell & Scoville.	433 54	433 54
2485-A	Maxwell, Richard	5,414 00	1,200 00
1594-A	Mead, I. F., & Co.	592 90	592 90
14330	Meaney, Eliza Ann.	397 40	¹ Dismissed
14247	Meaney, Eliza Ann, & ano.	1,200 00	¹ Dismissed
1891-A	Mechanicville Bridge Co.	500 00	¹ Dismissed
1890-A	Mechanicville Improvement Co.	800 00	¹ Dismissed
2727-A	Medici, Frank	200 00	135 00
2470-A	Medina, Village of.	4,000 00	2,064 40
9312	Meenly, Thomas	1,048 80	² Dismissed
915-A	Meneeley, Thomas	980 25	State
2067-A	Meil, Christina Maggregor ...	2,921 60	¹ Dismissed
2132-A	Mendham Brothers ...	2,584 29	2,584 29

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1880-A	Menihan, Jeremiah G.	\$1,000 00	\$50 00
2459-A	Menzner, John	426 50	180 00
14293	Messig, William, & ano.	700 00	⁴ Dismissed
14331	Messig, William, & ano.	700 00	¹ Dismissed
1432-A	Mestler, Philip L.	420 00	² Dismissed
1785-A	Mestre, Albert, & Co. . .	4,680 00	4,680 00
2570-A	Milage, George W., & ano.	1,163 50	¹ Dismissed
10508	Milage, George W., & ano.	5,029 50	¹ Dismissed
803-A	Miller, Franklin H. . . .	800 00	282 60
804-A	Miller, Franklin H. . . .	1,356 45	406 96
2644-A	Miller, Henry	3,378 04	¹ Dismissed
10872	Miller, Irvin	4,050 00	⁴ Dismissed
8588	Miller, Jacob	715 00	² Dismissed
8808	Miller, N. Jerome.	203 45	² Dismissed
1717-A	Miller & Co.	3,737 95	3,737 95
14289	Mills, Alma	1,363 60	¹ Dismissed
14441	Mills, Alma	140 00	50 00
10886	Miner, John E.	300 00	⁴ Dismissed
14297	Minnick, John	180 00	State
14298	Minnick, John	195 00	State
14299	Minnick, John	80 00	State
14300	Minnick, John	80 00	State
9037	Minster, Fred	200 00	90 00
9971	Minster, Fred	200 00	85 00
13892	Minton, Albert M.	200 00	75 00
14458	Minton, Albert M.	190 50	75 00
1064-A	Minton, Charles E.	274 50	State
1954-A	Minzesheimer, Charles, & Co.	9,184 13	9,184 13
1005-A	Mitchell, William P. . . .	3,546 21	3,546 21
9701	Mohawk Mfg. Co.	1,000 00	200 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14134	Mohawk Valley Brick & Supply Co.	\$996 00	\$200 00
10437	Mohawk Valley Canning Co.	21,000 00	2,225 20
1748-A	Mohonk Contracting Co., The	8,282 78	⁶ Dismissed
14385	Monahan, Honorah ...	400 00	75 00
1918-A	Monk, Ella May, & Snedeker, Mertie Monk	1,500 00	¹ Dismissed
2214-A	Montgomery, Henry E., & Co.	220 70	220 70
14348	Moore, Clark W.	1,001 50	66 00
14349	Moore, Clark W.	1,801 50	1,200 00
14350	Moore, Clark W.	2,001 50	1,000 00
4059	Moore, John	22,691 14	² Dismissed
13817	Moore, Robert D.	435 00	100 00
1625-A	Moore & Schley.	2,870 66	2,870 66
2283-A	Moore, Leonard & Lewis	6,654 48	6,654 48
9417	Moreau, Town of.	2,603 50	² Dismissed
2364-A	Morgan, Andrew D.	799 90	¹ Dismissed
13955	Morgan, Gifford	925 00	386 60
1370-A	Morgan, S. Maria, et al.	8,000 00	3,400 00
1371-A	Morgan, S. Maria.	1,500 00	500 00
10807	Morrison, William	1,398 90	675 00
2021-A	Morse, Charles A., & Co.	2,333 06	2,333 06
2803-A	Munro, John I.	35,000 00	21,284 00
2441-A	Murdock, Robert B.	6,544 82	4,101 07
10536	Murphy, Charles E.	601 02	² Dismissed
9221	Murphy, James P., & ano.	225 00	75 00
10265	Murphy, Michael, et al.	4,682 58	¹ Dismissed

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁶ Dismissed on account of settlement of claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14537	Murray, James	\$600 00	\$125 00
778-A	Murray, James T.	438 25	398 25
2560-A	Murray, Patrick H.	10,411 16	10,396 07
2561-A	Murray, Patrick H.	4,641 73	3,857 49
10873	Myers, Adolph, et al.	3,000 00	⁴ Dismissed
41-A	Myers, Adolph, et al.	3,000 00	210 00
10717	Myers, Nelton C.	10,371 50	¹ Dismissed
1645-A	National Advertising Co.	202,226 63	*
13910	Naylor, Charles, et al.	2,150 00	171 00
14538	Naylor, Charles, & ano.	470 00	100 00
2149-A	Neidrauer, Nelson	100 00	90 00
2603-A	Nellis, Philena, & ano.	2,676 20	900 00
9195	Nelson, Lucy A.	2,508 25	¹ Dismissed
9189	Nelson, Lucy A.	12,000 00	2,500 00
2794-A	Nenni, Delfino, & ano.	501 50	175 00
13900	Nesbit, Elinor, et al.	1,396 00	400 00
1703-A	Newborg, J. L., & Bro.	888 15	888 15
2248-A	Newborg & Co.	4,019 55	4,019 55
819-A	Newcomb, Cora E.	1,070 00	² Dismissed
1835-A	Newcomb, Fred T.	200 00	² Dismissed
162-A	Newey, Arthur G.	1,000 00	225 00
163-A	Newey, Lois M.	200 00	50 00
2473-A	New York, City of.	7,602 61	280 68
412-A	New York Central & H. R. R. R. Co.	347,465 05	¹ Dismissed
606-A	New York Central & H. R. R. R. Co.	2,500 00	¹ Dismissed
607-A	New York Central & H. R. R. R. Co.	2,500 00	¹ Dismissed
1073-A	New York Central & H. R. R. R. Co.	1,500,000 00	¹ Dismissed

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1526-A	New York Central & H. R. R. R. Co.....	\$800 00	¹ Dismissed
2035-A	New York Central & H. R. R. R. Co.....	150 00	¹ Dismissed
2036-A	New York Central & H. R. R. R. Co.....	50 00	¹ Dismissed
2073-A	New York Central & H. R. R. R. Co.....	25,150 00	⁷ Dismissed
10647	New York Central & H. R. R. R. Co.....	1,737 90	\$900 00
10824	New York Central & H. R. R. R. Co.....	100 00	¹ Dismissed
2302-A	New York Central Rail- road Co.	49,000 00	¹ Dismissed
2556-A	New York Central Rail- road Co.	200 00	¹ Dismissed
14372	New York Central Rail- road Co.	200 00	175 00
13936	New York State Rail- ways	200 00	¹ Dismissed
14135	New York State Rail- ways	7,763 14	¹ Dismissed
14136	New York State Rail- ways	2,521 91	¹ Dismissed
14137	New York State Rail- ways	6,329 99	¹ Dismissed
1205-A	New York Telephone Company	209 19	¹ Dismissed
442-A	Niagara, Lockport & On- tario Power Co.....	4,180 00	3,806 96
443-A	Niagara, Lockport & On- tario Power Co.....	971 34	962 09
444-A	Niagara, Lockport & On- tario Power Co.....	1,465 62	1,456 37

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

⁷ Dismissed the State having reconveyed lands involved in claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
10176	Niagara, Lockport & Ontario Power Co.....	\$471 38	\$86 69
10179	Niagara, Lockport & Ontario Power Co.....	290 69	271 44
10180	Niagara, Lockport & Ontario Power Co.....	2,089 15	2,068 90
1581-A	Nicholas, H. I., & Co..	472 04	472 04
9983	Nicholas, Mark A., & ano.	2,507 00	¹ Dismissed
615-A	Niles, Isabel W., &c...	1,500 00	⁴ Dismissed
2431-A	Noble, Clifford A.....	600 00	150 00
884-A	Northrop, Anna	556 79	307 50
1331-A	Northrup, Ida S., et al.	975 90	385 00
2274-A	Northrup, James M., et al	3,000 00	600 00
5153	Norton, Charlotte M...	1,900 00	² Dismissed
1631-A	Norton, E. H., & Co...	618 10	618 10
1906-A	Norton, Ex. & Co.....	24 82	24 82
2834-A	Nowack, Antonio	1,003 00	¹ Dismissed
49-A	Oakes, George E., & ano.	500 00	¹ Dismissed
13939	Oberlander, Harriet I..	2,300 00	400 00
1071-A	O'Brien, James	2,000 00	400 00
2704-A	O'Brien, James	1,500 00	400 00
9470	O'Brien, Jarvis P.....	2,500 00	1,000 00
1757-A	O'Brien, Smith, as trustee, &c.	650 00	200 00
1705-A	O'Dell, Daniel, & Co...	1,042 07	1,042 07
2836-A	O'Donnell, Johanna, & ano.	5,200 00	1,972 00
1873-A	Oelrichs, Charles M., & Co.	381 48	381 48
13981	Ohleh, Mary	300 00	250 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14455	Ohleh, Mary	\$150 00	\$125 00
8589	Ohm, Christopher	224 00	² Dismissed
2450-A	Olds, G. Florence	200 00	50 00
1843-A	Oliphant, James H., & Co.	1,763 64	1,763 64
2763-A	O'Neil, Frank S.	1,085 47	1,080 64
10579	Ontario Knitting Co. . .	50,157 00	2,750 00
1620-A	Oppenheim, Laurent . .	536 50	536 50
1735-A	Orvis Bros. & Co.	183 90	183 90
9668	Oswego Canal Co., The.	10,000 00	¹ Dismissed
9677	Oswego Canal Co., The.	40,000 00	¹ Dismissed
14207	Oswego Canal Co., The.	40,000 00	¹ Dismissed
14208	Oswego Canal Co., The.	10,000 00	¹ Dismissed
561-A	Oswego Country Club. .	5,000 00	¹ Dismissed
1168-A	Oswego Country Club. .	13,000 00	¹ Dismissed
14271	Oswego Country Club. .	5,000 00	¹ Dismissed
9666	Oswego Dock & Land Co	7,500 00	¹ Dismissed
14206	Oswego Dock & Land Co	7,500 00	¹ Dismissed
14230	Oswego River Power Transmission Co. . . .	626 76	622 44
13966	Owens, John S.	150 00	75 00
13756	Paddock, Fred N.	100 00	² Dismissed
14191	Page, Mary Etta.	1,251 60	500 00
1637-A	Palmer, Charles H., et al.	263,879 13	*
807-A	Palmyra Gas & Electric Co.	35 00	¹ Dismissed
808-A	Palmyra Gas & Electric Co.	40 00	¹ Dismissed
809-A	Palmyra Gas & Electric Co.	200 00	¹ Dismissed
1045-A	Palmyra Water Works Co.	1,442 93	¹ Dismissed

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
643-A	Park, Emma B.....	\$12,000 00	\$3,250 00
9288	Parke, James H.....	2,578 22	¹ Dismissed
992-A	Parke, James H.....	1,000 00	¹ Dismissed
2652-A	Parke, James H.....	2,578 22	¹ Dismissed
14325	Parker, Foster	900 00	500 00
2452-A	Parker, Frank P.....	567 50	135 00
917-A	Parker, Robert	635 00	State
9104	Parkhurst, Alonzo B...	1,500 00	² Dismissed
1831-A	Parkinson & Burr.....	519 78	519 78
2118-A	Parmelee, Jane W., et al	6,000 00	¹ Dismissed
8938	Parrish, Frank	150 00	² Dismissed
14130	Parshall, DeWitt C., as adm.	200 00	80 00
2361-A	Parsons, James W., & ano.	900 00	200 00
1127-A	Paschke, Rachael	3,500 00	1,000 00
528-A	Passorelli, Felice, & ano.	2,000 00	750 00
2457-A	Patrick, Walter J.....	173 33	35 00
10818	Paul, Peter V., & ano..	1,000 00	¹ Dismissed
1809-A	Pearl & Company.....	4,351 00	4,351 00
8968	Pearse, James C.....	120 00	² Dismissed
2398-A	Pell, S. H. P., & Co...	3,589 50	3,589 50
10892	Pemble, William, & ano.	100,000 00	⁴ Dismissed
8590	Pendorf, John G.....	645 00	² Dismissed
2840-A	Penfield, Edgar J.....	4,000 00	¹ Dismissed
13853	Penfield, Edgar J., & ano.	4,000 00	¹ Dismissed
962-A	Penn Bridge Co.....	3,799 97	1,500 00
9050	Perkins, George R....	320 00	² Dismissed
9697	Perry, Frederick F., & ano.	5,200 00	1,928 00
1006-A	Phorzeiner, Carl H....	6,375 49	6,375 11
2514-A	Pierce, B. D., Jr.....	15,559 11	State

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1574-A	Pierce, Carrie F., & ano.	\$600 00	\$100 00
14131	Pittsford Milling Co., Inc.	389 25	349 46
1778-A	Place, Daniel A.	250 00	100 00
1706-A	Pomroy Bros.	164 93	164 93
10289	Porter, Hattie A.	2,500 00	200 00
482-A	Porter, Mary L.	2,000 00	¹ Dismissed
2249-A	Post Brothers & Co.	453 70	453 70
1598-A	Post & Flagg, etc.	6,126 76	6,126 76
13906	Powers, Robert	175 00	75 00
2842-A	Pratt, Anna T.	2,221 80	138 65
14387	Prescott, Sarah M.	200 00	100 00
1898-A	Prince, Leo M.	26 00	26 00
1769-A	Prince & Whitely.	757 32	757 32
1901-A	Probst, Wetzlar & Co.	993 33	993 33
10510	Pronath, William	5,000 00	¹ Dismissed
930-A	Pronath, William	225 00	State
2435-A	Pronath, William	250 00	State
1871A	Provost Brothers & Co.	2,822 34	2,822 34
2115-A	Public Service Contract- ing Co.	13,260 47	13,260 47
1455-A	Putnam, Simon M., et al	1,679 70	¹ Dismissed
10453	Quade, William A., et al	428 00	125 00
2678-A	Quade, William A., & ano.	5,500 00	1,151 82
2679-A	Quade, William A., & ano.	1,200 00	161 37
14332	Quimby, Clinton M.	151 50	¹ Dismissed
9574	Quinlan, Edward	302 00	² Dismissed
1569-A	Quinn, Peter J.	150 00	45 00
14352	Ramsdale, W. Crawford, et al	1,501 50	675 00
1761-A	Rand, Philip C., & ano., &c.	7,700 00	3,000 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14144	Rand Powder Co., D. C.	\$1,200 00	\$90 00
1677-A	Randolph, Edmund, & ano.	4,472 76	4,472 76
14188	Rankert, George	500 00	250 00
8862	Ranney, James, & ano. .	1,000 00	² Dismissed
2559-A	Rathbun, Fred G., & ano	6,245 10	2,000 00
1713-A	Raymond, Pynchon & Co.	2,762 83	2,762 83
2650-A	Reed, Ervin M.	3,000 00	1,500 00
2656-A	Reed, Ervin M.	3,000 00	1,500 00
10728	Reddy, James, et al. . . .	31,806 39	5,100 00
2158-A	Redmond & Co.	389 48	389 48
10256	Reef, Simon	3,700 00	125 00
14343	Reynell, George	300 00	¹ Dismissed
13839	Rhodes, Hartley R., & ano.	100 00	100 00
1490-A	Rice, George A.	199 00	150 00
13836	Rich, Heman J., & ano.	725 00	150 00
14124	Riley, Bridget	500 00	50 00
8138	Roarke, Helen S.	3,040 00	¹ Dismissed
10224	Robbins, Anna E.	16,680 00	⁴ Dismissed
1648-A	Roberts Milling Co. . . .	67,500 00	*
14427	Rochester & Genesee Valley R. R.	225,000 00	¹ Dismissed
520-A	Rochester Sand Co. . . .	9,352 90	2,691 66
2711-A	Roe, John M., as trustee	3,231 00	700 00
9294	Rogers, Elizabeth M. . .	39,548 00	¹ Dismissed
2617-A	Rogers & Gould.	194 00	194 00
895-A	Rogers, Jesse B., et al.	1,949 00	State
1947-A	Rose, Oswald J. C.	2,500 00	650 00
10236	Ross Bush Co.	3,139 79	2,739 75
13755	Ross, George, & ano. . . .	45 00	30 00

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1919-A	Ross, John H., et al...	\$2,000 00	¹ Dismissed
1629-A	Rothschild & Cammerer	4,439 28	\$4,439 28
14467	Rothstein, Julius, & ano	4,500 00	1,340 00
608-A	Rouse, Lewis	315 00	63 50
13945	Rouse, Lewis	700 00	40 00
14540	Rouse, Lewis	120 00	40 00
1126-A	Royal, Alexander, as adm.	25,000 00	² Dismissed
1485-A	Rumsey & Co., L't'd..	319,000 00	*
1646-A	Rumsey & Co., L't'd..	543,051 87	*
1646-A	Rumsey Pump Co., L't'd, et al.....	†	540,248 01
14291	Russ, A. Eugene.....	50 00	¹ Dismissed
1445-A	Russell, George H.....	600 00	10 00
2694-A	Russell, George H.....	65 00	30 00
1781-A	Russell, J. B., & Co...	1,136 93	1,136 93
1599-A	Rutter & Gross.....	291 00	291 00
10461	Ryan, Edward J.....	1,750 00	¹ Dismissed
13884	Rybicki, John	2,500 00	¹ Dismissed

* See the following explanatory note.

† The claim of Rumsey Pump Co., Ltd., et al., is an amended, supplemental and consolidated Claim, including within it the following claims:

Claim No.	Claimant
1642-A	Sarah Allen.
1650-A	Chester A. Braman.
1651-A	Cast Thread Fitting and Foundry Co.
2106-A	Thomas J. Clary, et al.
1652-A	Fred Maier & Sons.
1649-A	Ivory Button Manufacturing Company.
1647-A	Michael Fritz and another, trustees.
1645-A	National Advertising Company.
1637-A	Charles H. Palmer and others.
1648-A	Roberts Milling Company.
1485-A	Rumsey & Company, Limited.
1646-A	Rumsey & Company, Limited.
1643-A	Seneca Falls Manufacturing Company.
1644-A	Seneca Falls Paper Company.

An award covering all the above claims was made in consolidated claim No. 1646-A for \$540,248.01. All the above claims are given separately in this list in their alphabetical order, with the amount claimed in each claim, but the amount of the award, in order to avoid duplication, is given only under the consolidated claim of Rumsey Pump Company, Limited, et al., consolidated No. 1646-A.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
8865	St. Paul Fire & Marine Insurance Co.	\$872 00	² Dismissed
9025	St. Paul Fire & Marine Insurance Co.	621 25	² Dismissed
1876-A	Salisbury & Co.	1,195 50	\$1,195 50
1881-A	Salmon, Walter	1,193 00	50 00
1034-A	Salmon River Power Co	607,550 00	100,000 00
8030	Sanders, David E., & ano.	740 00	² Dismissed
1563-A	Sanders, L. Ten Broeck, & ano.	445 00	² Dismissed
1003-A	Sannucci, Louise	2,700 00	250 00
2824-A	Santspree, Amos	5,946 00	State
8593	Saunders, Catherine M.	138 00	² Dismissed
1746-A	Savin, F. W., & Co.	1,179 81	1,179 81
6312	Sawyer, Elmer	1,125 00	² Dismissed
2362-A	Savage, Robert P.	1,500 00	125 00
1908-A	Schafer, L. & E.	900 50	900 50
10066	Schatazlif, August	4,500 00	State
2739-A	Scheckelmann, Henry	3,486 25	¹ Dismissed
1883-A	Schick, Karl A.	1,050 00	50 00
9570	Schlesing, George	233 00	80 00
9569	Schlesing, Henry	445 00	60 00
2417-A	Schlosser, Elizabeth, & ano.	760 00	100 00
2418-A	Schmlske, John and Mary	923 00	70 00
8594	Schneible, Jodock	250 00	² Dismissed
8595	Schneible, Valtin	615 00	² Dismissed
13934	Schnuer, George	350 00	¹ Dismissed
2382-A	Schroeppel, Albert, et al	2,500 00	160 00
1737-A	Schultheis, Christian N.	2,959 25	2,959 25
1596-A	Schuyler, Chadwick & Burnham	1,646 24	1,636 24

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1547-A	Schuyler, Douw W.	\$87 00	\$57 50
1546-A	Schuyler, Peter J.	69 00	50 00
14327	Scofield, Charles M., & ano.	1,000 00	100 00
14321	Scofield, George A., & ano.	4,037 00	¹ Dismissed
811-A	Scofield, Katherine, et al	3,855 40	¹ Dismissed
2761-A	Scott, Robert G., et al..	3,500 00	1,750 00
2476-A	Scozzafava, Mary Ann, admr.	10,000 00	2,000 00
817-A	Seager, Frances M.	480 00	State
8284	Seaman, George I.	200 00	² Dismissed
8596	Seigel, Andrew	935 00	² Dismissed
1828-A	Seligman, J. & W., & Co.	1,213 35	1,213 35
1736-A	Seligman & Meyer.	1,121 06	1,121 06
1670-A	Seligsberg, F. L. & Co..	1,321 61	1,321 61
1643-A	Seneca Falls Mfg. Co..	326,053 45	*
1644-A	Seneca Falls Paper Co.	134,165 45	*
13898	Sexton, Pliny T.	3,199 36	¹ Dismissed
1666-A	Sharp & McVickar.	176 10	176 10
9814	Shea, James R.	8,000 00	² Dismissed
9985	Shea, Maggie L.	1,500 00	900 00
13847	Sheahan, Elizabeth M.	1,500 00	500 00
1808-A	Shearson, Hammill & Co	6,347 08	6,347 08
9486	Sheffield, John C.	75 00	61 00
1990-A	Sheldon, W. C., & Co.	378 04	378 04
397-A	Shelter, Mary, & ano. . .	66,564 50	19,316 50
2156-A	Shoemaker, Bates & Co.	569 34	569 34
2575-A	Shurtleff, Wm. A.	60 00	60 00
14326	Shuster, Martha B., et al	2,040 00	¹ Dismissed
14461	Sichel, E. A. & Co.	1,096 52	1,096 52
14167	Siegel, Andrew	4,750 00	State
719-A	Signor, James H.	500 00	² Dismissed

* See explanatory note on page 373.

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14396	Silsby, George C.	\$197 00	\$125 00
1156-A	} Silsby, John K.	{ 500 00 }	784 70
10331		{ 1,450 00 }	
1303-A	Silsby, Seth	200 00	State
14397	Silsby, George C., et al.	100 00	75 00
101-A	Sime, George W.	900 00	⁴ Dismissed
100-A	Sime, George W.	1,380 00	⁴ Dismissed
1585-A	Simmons & Slade.	2,389 56	2,389 56
1796-A	Simmons & Emanuel..	1,602 00	1,602 00
14122	Skene, Frank M., & ano.	3,763 60	3,228 54
1907-A	Slayback & Co.	123 20	123 20
1903-A	Slive, Ann, by guardian	6,000 00	400 00
8218	Smelzer, Lucy Tracy...	8,270 00	² Dismissed
13918	Smilewski, Joseph	138 00	42 00
2610-A	Smith, Ada, as adm., &c	550 00	325 00
2849-A	Smith, Charles H.	620 00	75 00
9930	Smith, Clement D., & ano.	8,000 00	¹ Dismissed
480-A	Smith, George H.	15,000 00	1,500 00
1910-A	Smith, Heck & Co.	788 02	788 02
2008-A	Smith, Isabell J., & ano.	2,300 00	¹ Dismissed
13917	Smith, Isabel J., et al..	1,027 10	308 13
8005	Smith, James B.	3,881 00	² Dismissed
2505-A	Smith, Martin H.	200 00	¹ Dismissed
1567-A	Smith, Mary A.	1,085 50	150 00
116-A	Smith, Mary E.	125 00	² Dismissed
10787	} Smith, Edwin P., & ano	{ 600 00 }	748 45
14193		{ 1,500 00 }	
10790	Smith, Morris, et al.	1,500 00	⁴ Dismissed
1974-A	Smith, Pratt G.	8,000 00	1,600 00
2598-A	Smith, Ulysses S. G.	100 00	¹ Dismissed
13903	Smith, William Bellin- ger	1,550 70	775 35

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
13975	Smith, William H., et al	\$2,800 00	\$644 19
2562-A	Smoulton, William	128 00	50 00
1814-A	Smyth, B. L., & Co. . . .	2,009 56	2,009 56
438-A	Snyder, Mary G.	200 00	² Dismissed
13978	Somers, John	200 00	¹ Dismissed
684-A	Sprague, Danley D., et al	3,165 00	575 00
708-A	Sprague, Homer E. . . .	1,000 00	¹ Dismissed
14472	Stacy, Edwin, et al. . . .	500 00	100 00
13883	Stafford, William C. . . .	200 00	State
14450	Stafford, William C. . . .	150 00	120 00
10500	Stainthorpe, Thomas, et al	1,850 00	600 00
10811	Stanley, John J., trustee	500 00	¹ Dismissed
2000-A	Stauring, Philip, & ano.	1,800 00	¹ Dismissed
13820	Stelter, Albert, & ano. .	5,000 00	1,600 00
1764-A	Sternbach, Morris & Co.	416 06	416 06
1704-A	Sternberger, Sinn & Co.	4,341 18	4,341 18
14210	Stevens, Stoddard M., et al	133 40	¹ Dismissed
10301	Stewart, Daniel	230 00	25 00
10307	Stewart, Hanna J.	240 00	60 00
1065-A	Stewart, James	310 00	State
1363-A	Stewart, James	155 00	State
2137-A	Stewart, William J.	155 00	State
13901	Stickles, Frank B.	713 80	175 00
13902	Stickles, Frank B.	400 00	100 00
838-A	Stockton, Albert H., & ano.	2,059 10	¹ Dismissed
2585-A	Stockton, Albert H., & ano.	2,059 10	¹ Dismissed
1619-A	Stokes, Walter C., & Co.	669 06	669 06
13835	Stone, Stanley M.	5,750 00	2,125 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
388-A	Stone, Stanley M.	\$6,400 00	⁵ Dismissed
2766-A	Storms, Frank	100 00	¹ Dismissed
1657-A	Stout & Co.	583 16	\$583 16
2211-A	Straughn, Elizabeth . . .	300 00	70 00
14323	Straughn, Levi, & ano..	2,500 00	550 00
10175	Strobel, Carrie E., et al	14,875 00	8,968 00
9529	Strobel, Daniel F., & ano	150,000 00	⁴ Dismissed
2819-A	Strobel, Daniel F., & ano	150,000 00	⁴ Dismissed
1795-A	Strong, Sturgis & Co. . .	1,180 34	1,180 34
2269-A	Stryker, Thomas H. . . .	1,000 00	700 00
389-A	Stuart, Charles W.	6,576 50	3,606 35
1545-A	Stube, Frederick W. . . .	80 00	55 00
2748-A	Stube, Frederick W. . . .	76 30	55 00
2162-A	Stube, Frederick W. . . .	25 00	² Dismissed
10581	Suiter, Mary A.	1,010 00	250 00
347-A	Suiter, Mary A.	865 00	225 00
2271-A	Suiter, Mary A.	690 00	375 00
13919	Sullivan, Dennis, & ano.	125 00	45 00
2038-A	Sullivan, John H., et al.	1,750 00	550 00
392-A	Sutherland, Cora M., et al	5,700 00	1,800 00
1603-A	Sutro Brothers & Co. . . .	2,303 99	2,303 99
14740	Swaisland, John W. . . .	218 50	211 00
1484-A	Swart, Anna E., & ano.	2,104 95	1,100 00
1810-A	Sweet, Edward, & Co. . .	2,771 26	2,771 26
2216-A	Sweet, Mary A.	200 00	¹ Dismissed
2217-A	Sweet, Mary A.	200 00	¹ Dismissed
1562-A	Sweet, Vaughn C., & ano	1,300 00	¹ Dismissed
2128-A	Swett, Albert L.	11,016 00	936 00
13893	Swick, Herbert G., as comm.	200 00	75 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

⁵ Dismissed upon stipulation because outlawed when filed.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
13894	Swick, Herbert G., as comm.	\$200 00	\$75 00
2758-A	Swift & Co. Inc.	300 00	State
1633-A	Tailer & Robinson	892 70	892 70
14565	Tappan, Lemuel	120 00	20 00
1315-A	Targett, A. S., & Co. . . .	101 25	80 00
1602-A	Tate & Hays, &c.	643 23	643 23
14153	Taylor & Crate.	3,256 92	2,000 00
2153-A	Taylor, Elmer E.	3,400 00	663 00
1572-A	Taylor, Herbert C., & Co	655 64	655 64
2140-A	Taylor, Livingston & Co	1,332 10	1,332 10
1811-A	Taylor, Smith & Hard.	1,986 94	1,986 94
2047-A	Taylor, Stephen	2,000 00	75 00
8599	Teelin, Willard G.	780 00	² Dismissed
1899-A	Tefft & Co.	2,558 65	2,558 65
2774-A	Tetzner, Caroline	2,500 00	500 00
2773-A	Tetzner, Jacob	1,000 00	100 00
1983-A	Thaler Brothers & Co..	1,102 12	1,102 12
1591-A	Thiener, Christian	930 00	¹ Dismissed
2315-A	Thomas, Carrie J., & ano	726 50	⁴ Dismissed
13916	Thomas, Charles M.	1,482 40	700 00
14173	Thomas, George W.	10,000 00	2,300 00
3072	Thompson, Mary J.	850 00	² Dismissed
2152-A	Tilden, J. Warren.	4,000 00	600 00
13980	Tooley, Arthur, et al..	1,100 00	550 00
2642-A	Totten, Marion D., & ano	5,731 60	¹ Dismissed
1878-A	Tower & Sherwood.	164 00	164 00
2039-A	Town, John J.	666 81	² Dismissed
10881	Train, Arthur C.	900 00	⁴ Dismissed
14182	Traube, Frederick W., & ano.	3,006 00	2,525 00
14248	Traver, John A.	350 00	¹ Dismissed

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14249	Traver, John A.....	\$1,442 00	¹ Dismissed
8600	Trexel, Fred	467 50	² Dismissed
8601	Trexel, George E.....	471 00	² Dismissed
2747-A	Trexler, Sarah E.....	150 00	¹ Dismissed
1985-A	Trowbridge & Co.....	447 66	\$447 66
1568-A	Tulett, James	2,640 00	1,350 00
9446	Turnbull, James M....	252 00	100 00
2018-A	Turner, Charles W., & ano.	700 80	700 80
10433	Turney, Thomas J....	2,600 00	1,075 00
10434	Turney, Thomas J....	1,000 00	350 00
8591	Tuttle, Orley C.....	1,505 00	² Dismissed
2721-A	Tuttle, Orley C., & ano.	13,500 00	5,200 00
8592	Tuttle, Porter B.....	383 00	² Dismissed
1738-A	Ulman Bros. — Ulman, Morse & Co.....	1,112 70	1,112 70
10268	United Society of Shakers	4,000 00	¹ Dismissed
10269	United Society of Shakers	1,600 00	¹ Dismissed
10270	United Society of Shakers	1,700 00	¹ Dismissed
10271	United Society of Shakers	9,320 00	¹ Dismissed
10272	United Society of Shakers	1,000 00	¹ Dismissed
1866-A	Upson, William H....	1,550 00	625 00
14181	Ursana, Angelo	3,506 00	2,800 00
14183	Ursano, Dominick, & ano.	2,006 00	1,400 00
63-A	Utica & Mohawk Valley Ry. Co.	7,008 50	¹ Dismissed
2232-A	Vahue, Nellie M.....	1,271 50	² Dismissed

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1978-A	Van Alstine, John A., as adm.	\$25,000 00	\$1,400 00
10827	Van der Kieft, Antonio.	49,700 00	19,700 00
10720	Vanderpool, William J..	2,804 50	¹ Dismissed
8598	Vandewalker, Adison .	410 00	² Dismissed
2154-A	Vandeworker, Mildred..	5,505 00	² Dismissed
2786-A	Van Dyke, Nellie, admr., etc.	1,673 40	474 13
14324	Van Dyne, Adelbert, & ano.	200 00	70 00
1797-A	Van Emburgh & Atter- bury	2,126 21	2,126 21
14511	Van Slyke, Melvin, as admr.	1,500 00	700 00
476-A	Van Vranken, Adam, & ano.	15,000 00	¹ Dismissed
2342-A	Vaughan & Co.	1,644 00	1,644 00
2787-A	Veeder, Maynard A. . . .	165 70	¹ Dismissed
8597	Verseimer, August	151 50	² Dismissed
13811	Vickery, Thomas, & ano.	2,000 00	275 50
2736-A	Vincent, Lottie, & ano..	1,000 00	60 00
8619	Visscher, William J. . . .	177 00	² Dismissed
1626-A	Von Hoffman, L., & Co.	507 90	507 90
14195	Voorhees, James L.	238 00	¹ Dismissed
2446-A	Vrooman, Peter	2,584 50	1,759 15
2443-A	Walker Brothers	930 32	930 32
1849-A	Walker, Joseph, & Sons.	1,230 81	1,230 81
2632-A	Wall, Thomas D.	200 00	¹ Dismissed
2818-A	Walrod, Frank	100 00	75 00
14363	Walter, Christian, Jr., et al.	1,500 00	550 00
14364	Walter, Christian, Jr., & ano.	1,000 00	75 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
399-A	Walters, Eli	\$344 00	Dismissed
2764-A	Walters, Eli	344 00	Dismissed
2161-A	Waples, W. L., Co.	465 00	\$465 00
8604	Ward, Almon H.	210 00	² Dismissed
2005-A	Wardwell & Adams.	2,230 98	2,230 98
14205	Warfield, Minnie	182 80	¹ Dismissed
160-A	Warner, William W.	1,200 00	500 00
1765-A	Warner & Co.	1,417 80	1,417 80
161-A	Warner, Elvira N.	375 00	200 00
14242	Washburne, James V.	6,892 40	¹ Dismissed
1753-A	Wassermann Bros.	8,867 96	8,867 96
1527-A	Watkins Boating Co.	340 23	340 23
2109-A	Watson, Hollins & Co.	655 90	655 90
1807-A	Watson, Thomas L.	1,753 87	1,753 87
2756-A	Wayne, County of.	400 00	¹ Dismissed
865-A	Wayne County Gas & Elec. Co.	539 00	252 83
869-A	Wayne County Gas & Elec. Co.	662 43	350 66
876-A	Wayne County Gas & Elec. Co.	1,126 49	1,076 30
964-A	Wayne County Gas & Elec. Co.	429 10	⁴ Dismissed
966-A	Wayne County Gas & Elec. Co.	429 10	⁴ Dismissed
1012-A	Wayne County Gas & Elec. Co.	50 00	50 00
1013-A	Wayne County Gas & Elec. Co.	1,418 68	1,326 67
1014-A	Wayne County Gas & Elec. Co.	888 60	807 15
1052-A	Wayne County Gas & Elec. Co.	4,968 06	2,653 73

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
14686	Wayne County Gas & Elec. Co.	\$858 20	\$691 59
14198	Wayne Telephone Co...	8,770 26	8,227 57
9907	Weaver, Charles C.	30,177 34	* 1,691 00
8021	Weaver, Dwight E.	618 50	² Dismissed
10210	Weaver, George F., Sons Co.	4,474 30	2,200 00
2507-A	Weaver, George F., Sons Co.	2,362 10	100 00
14202	Weaver, Stephen J.	2,439 50	⁴ Dismissed
14203	Weaver, Stephen J.	11,595 67	⁶ Dismissed
1233-A	Weaver, William W., & ano.	1,339 00	535 00
13973	Webb, Frances A.	150 00	37 00
1752-A	Webb & Prall.	702 50	702 50
2453-A	Weimer, Frederick	615 00	60 00
1597-A	Weinheimer, Edward N.	500 00	² Dismissed
2806-A	Weinheimer, Edward N.	500 00	300 00
8603	Weismantle, John S.	2,055 00	² Dismissed
2714-A	Welch, James C.	2,150 00	1,150 00
1714-A	Werner & Broun.	817 36	817 36
13799	West, Elmer J., et al. ...	2,740 20	1,560 00
1946-A	West, J. Terry, et al. ...	599 01	564 26
9759	Westbrook, Jennie	5,000 00	1,520 00
8866	Western Assurance Co. of Toronto	4,652 55	² Dismissed
9024	Western Assurance Co. ...	3,667 00	² Dismissed
457-A	Western, Town of.	3,504 50	1,802 36
456-A	Western and Lee, Towns of ...	2,600 00	1,347 43

* The award in claim of Charles C. Weaver, claim No. 9907-A, covers only parcel No. 2036.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

⁶ Dismissed on account of settlement of claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
10368	West Shore Railroad Co. & ano.	\$50,250 00	¹ Dismissed
14255	West Shore Railroad Co.	360 00	\$180 00
14369	West Shore Railroad Co.	150 00	¹ Dismissed
14370	West Shore Railroad Co.	125 00	¹ Dismissed
1177-A	West Shore Railroad Co.	100 00	100 00
10639	Whalen, Mary, et al. . . .	3,087 00	700 00
2213-A	Whedon, Milford D. . . .	6,838 38	State
10458	Whipple, Earl & Florence	228 00	60 00
10312	Whipple, Ebenezer & George	1,260 00	140 00
10318	Whipple, Frank	700 00	75 00
13976	Whitcomb, Emma	2,000 00	600 00
1436-A	Whitcomb, Luella	2,800 00	96 00
2687-A	Whitcomb, Luella	400 00	150 00
1851-A	White & Meyer.	1,003 92	1,003 92
8605	White, George B.	250 00	² Dismissed
2707-A	White, Patrick II.	1,000 00	400 00
2708-A	White, Patrick II.	4,000 00	¹ Dismissed
10624	Whited, George Belmont, & ano.	650 00	⁷ Dismissed
45-A	Whitehall, Village of. . .	5,000 00	600 00
10876	Whitehall, Village of. . .	1,800 00	⁴ Dismissed
10875	Whitehall, Village of. . .	5,000 00	⁴ Dismissed
9988	Whitmore, C. B., & Co.	7,450 00	3,500 00
2116-A	Whitmore, B. C.	6,000 00	1,500 00
2624-A	Whitmore, Rauber & Vininus, Inc.	24,469 97	23,764 97
1747-A	Whitney, H. N., & Sons.	572 64	572 64
1360-A	Wiegand, Christian.	1,525 00	375 00
13935	Wilcox, Almon	1,000 00	116 00
10309	Wilcox, Bernard	230 00	30 00

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

⁷ Dismissed the State having reconveyed lands involved in claim.

Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
1444-A	Wilcox, Bernard E....	\$5,000 00	State
2686-A	Wilcox, Bernard E....	680 00	\$150 00
10305	Wilcox, Cyrus C.....	250 00	40 00
1442-A	Wilcox, Cyrus C.....	9,000 00	250 00
2684-A	Wilcox, Cyrus C.....	1,000 00	250 00
1443-A	Wilcox, Fred A.....	2,850 00	25 00
2685-A	Wilcox, Fred A.....	550 00	20 00
2848-A	Wilcox, Horace E.....	270 00	40 00
10302	Wilcox, Lewis	160 00	40 00
14214	Wilder, Ralph E.....	600 00	400 00
10899	Wilford Realty Co.....	12,235 08	⁴ Dismissed
10713	Williams, Charles M...	35,681 00	13,022 40
14544	Williams, Frederick, & ano.	90 00	10 00
10104	Williams, Mary R.....	500 00	² Dismissed
2793-A	Williamson, Mary L...	5,717 00	¹ Dismissed
1820-A	Williston, J. R., & Co..	3,065 36	3,065 36
14480	Wilson, Estella	250 00	100 00
2131-A	Wilson, Watson & Herbert	3,506 75	3,506 75
2590-A	Winegar, Harvey D....	7,132 00	¹ Dismissed
1494-A	Winn, John	200 00	State
2052-A	Wolf, Edwin, et al.....	3,890 54	3,890 54
2796-A	Wollenberg, Martin ...	265 05	¹ Dismissed
1819-A	Worden & Co.....	1,209 45	1,209 45
1701-A	Worden, Isidor, Jr.....	894 00	894 00
14718 } 14717 } 14719 }	Wooding, Albert	{ 384 00 } { 384 00 } { 384 00 }	200 00
1135-A	Woods, Alfred W., & ano.	25,250 00	¹ Dismissed
1676-A	Wrenn Brothers & Co..	6,456 46	6,456 46

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

⁴ Dismissed on stipulation because duplicate claim.

 Claims disposed of in 1916

No.	Name of Claimant	Amount Claimed	Amount Awarded
215-A	Wright, John	\$170 00	\$150 00
14456	Wright, Milton N.	125 00	100 00
13932	Wyborn, Carrie D., et al.	7,220 00	800 00
1440-A	Wyborn, William	3,500 00	35 00
2692-A	Wyborn, William	350 00	40 00
8602	Yager, Helen Mrs.	190 00	² Dismissed
14120	Yawger, Harriet E.	826 50	500 00
14119	Yawger, T. Jefferson.	1,000 00	1,000 00
10613	Young, Frank L.	3,000	² Dismissed
14243	Young, John	31,485 06	23,487 79
2099-A	Zimmermann & Forshay.	2,020 19	2,020 19
1621-A	Zuckerman, Henry, & Co.	912 12	912 12
14342	Zwiwka, Johanna	300 00	¹ Dismissed
Total number of claims disposed of during 1916.			1,342
Total amount claimed in said 1,342 claims.		\$17,014,576 17	
Total amount awarded in said 1,342 claims, ex- clusive of interest.			2,274,558 09

CLAIMS FOR THE PERMANENT APPROPRIATION OF LAND

Disposed of during 1916, including claims in which awards were made and claims which were dismissed for various reasons.	592
Total amount claimed in said 592 claims.	\$12,858,000 84
Total number of claims in which awards were made	330
Amount claimed in said 330 claims.	9,377,385 18
Amount awarded in said 330 claims.	1,213,324 88
Number of claims dismissed in 1916, on account of settlements by the appraiser, refiling of claims, etc.	262

¹ Dismissed because settled by contract with the Special Examiner and Appraiser of Canal Lands.

² Dismissed for want of prosecution.

 Claims disposed of in 1916

 CLAIMS OTHER THAN FOR THE PERMANENT APPROPRIATION OF
 LAND — CANAL CLAIMS, REFUND STAMP TAX, CONTRACT
 CLAIMS, ETC.

Disposed of during 1916, including claims in which awards were made and claims which were dismissed for various reasons.....	750
Total amount claimed in said 750 claims.....	\$3,156,575 33
Total number of claims in which awards were made	564
Amount claimed in said 564 claims.....	2,476,078 49
Amount awarded in said 564 claims.....	1,061,233 21
Number of claims dismissed in 1916 for various reasons	186

Total number of claims dismissed during 1916, including claims dismissed on account of being settled by the canal appraiser, claims refiled, claims dismissed after trial and for want of prosecution 448

Settled by appraiser.....	226
Want of prosecution.....	106
Refiling, etc.	59
After trial	57

 448 claims dismissed

Total amount claimed in said 448 claims dismissed \$5,161,112 50

Total number of claims in which awards were made..... 894
 Claims dismissed 448

Claims disposed of during 1916..... 1,342

 Claims disposed of in 1916

Total amount claimed in said 894 claims in which awards were made during 1916, including claims for the permanent appropriation of land and all other claims.....	\$11,853,463 67
Total amount awarded in said 894 claims.....	2,274,558 09

AWARDS BY REFEREES

The following awards by retired judges of the Court of Appeals, acting as official referees under chapter 229 of the Laws of 1911, were filed with the Court of Claims during the year 1916:

No.	Name of Claimant	Amount Claimed	Amount Awarded
(By Hon. Irving G. Vann)			
9918	Syracuse & Baldwinsville Ry. Co.....	\$255,000 00	\$18,500 00
10827	Van der Kieft, Antonio.	49,700 00	19,700 00
1860-A	Schwarte, John A. T., as trustee, etc.	25,000 00	18,628 51
(By Hon. Albert Haight)			
1474-A	Lane Bros. Co.....	433,570 68	114,326 53
1552-A	Ludington Sons, Inc., I. M.	171,907 37	44,226 91
2744-A	Peter F. Connolly Co...	64,421 40	29,000 00
Totals		\$999,599 45	\$244,381 95

JUDGMENTS ENTERED BY DIRECTION OF APPELLATE COURTS

Barrett, William G., and another, Claim No. 769-A.

Determination of Board of Claims for \$2,163.78 affirmed with costs. (173 App. Div. 986. Dissenting opinion by Kellogg, P. J.)

Judgment of the Court of Claims affirming determination and for \$78 costs entered September 7, 1916.

Claims disposed of in 1916

Coble, John A., Claim No. 10012.

Determination of Board of Claims for \$1,368 affirmed with costs. (172 App. Div. 912. No opinion.)

Judgment of Court of Claims affirming determination and for \$82 costs entered February 2, 1916.

Cookinham, Henry J., Claim No. 10776.

Determination of Board of Claims modified by allowing claimant \$5,000 consequential damages and as so modified affirmed without costs. (171 App. Div. 80. Opinion by Kellogg, P. J.) All concurred, except Lyon and Cochrane, JJ., who voted for affirmance.

Judgment of the Court of Claims for \$15,083.74 entered March 4, 1916.

Danes, Samuel A., and another, Claim No. 293-A.

Determination of Board of Claims for \$11,359.18 reversed in part with costs to the State in the Appellate Division and in the Court of Appeals and remitted to the Court of Claims for further proceedings. (219 N. Y. 67. Opinion by Collin, J., concurred in by Willard Bartlett, Ch. J.; Chase, Cuddeback, Cardozo, Pound, JJ.)

Judgment of the Court of Claims reversing determination in part and for \$801 costs to the State entered October 20, 1916.

Finch, William T., and another, Claim No. 727-A.

Determination of the Board of Claims on the report of Hon. Irving G. Vann, official referee, for \$91,812.50 affirmed with costs. (169 App. Div. 902. No opinion.)

Judgment of the Court of Claims affirming determination and for \$132.55 costs entered February 15, 1916.

First Construction Co., Claim No. 885-A.

Determination of the Board of Claims (Hon. Albert Haight, official referee, having made a report on the law) for \$1,283,219.33 affirmed without costs on the opinion of the official referee. (174 App. Div. 560.)

Judgment of the Court of Claims affirming said determination entered February 2, 1916.

Claims disposed of in 1916

McCammon, George W., Claim No. 3009.

Judgment of Court of Claims for \$148.75 affirmed with costs. (117 App. Div. 913. No opinion.)

Judgment of the Court of Claims affirming previous judgment and for \$90.60 costs entered November 2, 1916.

New York Telephone Co., Claim No. 614-A.

Judgment of the Court of Claims for \$997.45 and \$119 costs affirmed without costs. (218 N. Y. 738 affirming 169 App. Div. 310.)

Judgment of the Court of Claims affirming previous judgment entered August 24, 1916.

Orleans County Quarry Co., Claims Nos. 702-A, 1108-A, 1111-A.

Determination of Board of Claims for \$94,477.08 reversed on the law and facts and new trial granted with costs to appellant to abide the event. (172 App. Div. 863. Opinion by Kellogg, P. J. All concurred.)*

Palmer, Lowell M., et al., Claim No. 775-A.

Judgment of the Court of Claims (entered on the report of Hon. Albert Haight as official referee) affirmed with costs. (174 App. Div. 933. All concurred, except Kellogg, P. J., who dissented in a memorandum, in which Woodward, J., concurred.)

Judgment of the Court of Claims affirming previous judgment for \$960,712.50 and for \$132.70 costs entered October 10, 1916.

Pratt, George L., et al., Claim No. 10788.

Determination of the Board of Claims (entered on the report of Hon. Albert Haight as official referee) for \$86,275 affirmed with costs. (172 App. Div. 914. No opinion.)

Judgment of the Court of Claims affirming previous determination and for \$298 costs entered February 26, 1916. Judgment affirmed with costs. (219 N. Y. 554. For per curiam opinion denying the State's motion for a re-argument, see 219 N. Y. 635.)

Judgment of the Court of Claims affirming previous determination and for \$183.90 costs entered December 12, 1916.

* No remittitur filed with the Court of Claims in 1916.

Claims disposed of in 1916

Saratoga Victoria Spring, Inc., Claim No. 10707.

Judgment of the Court of Claims dismissing the appeal to the Court of Appeals by the State with \$50.50 costs to claimant entered March 18, 1916. (See 217 N. Y. 663.)

Smith, Alice E., Claim No. 9750.

Determination of the Board of Claims dismissing claim affirmed with costs to the State. (169 App. Div. 438. Opinion by Lyon, J. All concurred.)

Judgment of the Court of Claims affirming determination with \$90 costs to the State entered February 24, 1916.

Smith, Savilla F., as admx., etc., Claim No. 10048.

Judgment of the Court of Claims affirming previous determination of the Board of Claims affirmed with costs. (218 N. Y. 657. No opinion.)*

Judgment of the Court of Claims affirming previous judgment and for \$111.53 costs entered May 19, 1916.

Van Antwerp, Bishop & Co., Claim No. 1573-A.

Judgment of the Court of Claims for \$1,318.58 and \$231.15 costs affirmed with costs. (218 N. Y. 422. Opinion by Chase, J.; concurred in by Willard Bartlett, Ch. J., Hiscock and Collin, JJ.; dissenting opinion by Seabury, J.; concurred in by Hogan, J.; Cardozo, J., not voting.)

Judgment of the Court of Claims affirming previous judgment and for \$140.95 costs entered August 31, 1916.

* (See 214 N. Y. 140. Opinion by Cardozo, J., concurred in by Willard Bartlett, Ch. J.; Miller and Seabury, JJ.; dissenting opinion by Hiscock, J.; concurred in by Chase and Hogan, JJ.)

INDEX DIGEST

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INDEX DIGEST*

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APPROPRIATION.		
The statutes for appropriations and claims against the State reviewed.		
Morgan & McLennan, exec., etc. v. State, 11 C. C. 38.		
<i>See also</i> Adirondack Woolen Co. v. State, 16 C. C. 1		
The word "appropriation" has a varying meaning but it cannot be interpreted to include a case of temporary or occasional flooding arising from an improvement constructed on a stream below the point of flooding.		
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AQUEDUCT.		
Where a claim for negligence, in allowing an aqueduct to leak and fill up the arches over a creek with accumulations of ice, rests upon a notice given to an officer of the State of the conditions, no recovery can be had where it appears that had the officer acted promptly upon the receipt of the notice, the damages would have happened despite anything that the State could have done. Town of Whitestown v. State, 13 C. C. 269.		
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* This index digest is a cumulative index digest to the opinions of the Court of Claims not only published in this volume but also in volumes 11, 12, 13, 14 and 15 of the Court of Claims Reports. It is suggested that persons using this index digest make a practice of consulting the headings to which cross reference is made.

AWARD.

Page.

The evidence of damages is to guide and not to control the court in arriving at its award, and where witnesses on the part of the owner testify that certain water power is worth \$34,000 and witnesses on behalf of the State testify that it is worth nothing, the court may make such an award between these estimates as it may deem proper. *Hall v. State*, 11 C. C. 109.

The principles of law underlying the cases where there is a lien or incumbrance on property that is subsequently appropriated seems to be that when the owner of land is divested of title by condemnation proceedings that moment he loses his land but becomes entitled to a right to damages which is personal and does not run with the land; that he may transfer this right to damages as any other personal right may be transferred subject to existing liens; that the right to damages will not pass by a deed which does not in terms include the damages; that an award takes the place of the land so far as underlying liens are concerned and the liens constitute an equitable claim upon the award; that a purchaser under a foreclosure of liens acquires no claim to the award and if there is a deficiency it constitutes an equitable claim against the award to the extent of the deficiency; that any surplus remaining after the payment of the underlying liens or any deficiency on their foreclosure goes to the owner. *McKee v. State*, 13 C. C. 220.

Where a claim is filed for damages for the appropriation of land, the Court of Claims cannot disregard the evidence and make an award less than the amount testified to by the lowest witness called as to the value of the property. *Burchard v. State*, 15 C. C. 239.

See PERMANENT APPROPRIATION; DAMAGES.

BADGES AND SEALS. See CONTRACT.

BAKER, E. BROWN, v. STATE, 12 C. C. 3.

BAKER, GEORGE W., v. STATE, 13 C. C. 22.

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BEEMAN, MALVINA, v. STATE, 16 C. C. 153

BELL, DAVID K., v. STATE, 15 C. C. 316.

BENEFITS. See DAMAGES.

BERINSTEIN, JACOB W., v. STATE, 13 C. C. 143.

BLACK RIVER CANAL.

Where a claimant alleges that his crops were flooded and destroyed by negligence of the State in carelessly and negligently emptying water into the Black river from Forestport feeder, and also alleges that the flooding was partly caused by placing flash boards on the State dam at Carthage, the burden is upon the claimant to prove that the acts were committed by the State. *Van Amber v. State*, 12 C. C. 68.

Where premises in a somewhat deteriorated condition are flooded through the negligent acts of the State causing damages to the structures

BLACK RIVER CANAL — Continued.

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and a loss of rents, the owner of the premises is entitled to the cost of making reasonable repairs to put his premises in a tenantable condition and to the loss of rents occasioned by the negligent acts of the State. In such a case the owner is not entitled to the diminution in the market value of the premises in addition to the cost of making repairs and the loss of rents. *Stevens v. State*, 13 C. C. 111.

BLOODY BROOK (ONONDAGA COUNTY)

See WOERNER v. STATE, 13 C. C. 422.

BOND. *See CONTRACT; DAMAGE; HIGHWAY.*

BONNEVILLE v. STATE, 12 C. C. 173.

BRIDGES.

Where the State constructed a bridge over the canal which was abandoned except for drainage purposes by the State and did not provide a railing, which resulted in the claimant walking off the bridge into the canal without any negligence on her part, the State is liable. *Van Alstyne v. State*, 11 C. C. 157.

Where the town of Lenox owned two bridges known as Peterboro and Main street bridges spanning a State ditch used for conveying surplus water from the Erie canal to Oneida lake, the State negligently widened and deepened a creek which undermined the abutments of the bridges making their construction and the building of the bridges necessary and in such case the State is liable for its negligent acts. *Town of Lenox v. State*, 12 C. C. 159.

Where a temporary bridge is constructed while the work of constructing a permanent bridge is in progress the claimant may recover the cost of building such temporary bridge. Allowance should be made to the State for the value of any material in the old bridge appropriated by the claimant. *Town of Lenox v. State*, 12 C. C. 159.

Taft v. State, 13 C. C. 250.

The State is not liable for damages to abutting property for closing a canal bridge pending repairs where it appears that the repairs were made with reasonable dispatch considering the circumstances. *Kline v. State*, 15 C. C. 366.

Under the provisions making the State liable only where upon the same facts an individual or corporation would be liable (Canal Law, § 47; Code of Civ. Proc., § 264) the State is entitled to the benefit of the provisions of the Highway Law (L. 1890, ch. 560, § 154; L. 1909, ch. 30, § 331) relating to the load which town bridges are required to bear. *O'Bryan v. State*, 15 C. C. 295.

Where the statute exempting a town from liability for the collapse of a bridge under a load of four tons or over (L. 1890, ch. 30, § 154) was amended by increasing the load to eight tons or over, the State has a reasonable time after the amendment takes effect to reconstruct its bridges to meet the requirements of the increased load and where an accident occurs 103 days after the amendment takes effect a reasonable time has not elapsed to charge the State with negligence for delay in

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reconstructing a bridge which fell with a load exceeding four and one-half tons. O'Bryan v. State, 15 C. C. 295.	
The State was held to be exempt from liability where an engineer undertook to drive over a canal bridge in a town a load weighing four and one-half tons and he was held to have assumed the risk in passing over the bridge where he had examined the bridge and after such examination reached the conclusion that it was safe and undertook to cross and went down with the bridge. O'Bryan v. State 15 C. C., 295.	
Claimant alleged that while crossing a highway bridge over the canal he stubbed his toe against one of the bridge planks, lost his balance and fell from the bridge to the canal towpath at a point where there was no guard rail along the side of the bridge. The State contended that claimant was not on the bridge when the accident happened, but had left the bridge and started down the stone steps leading to the towpath. The evidence on the cause of the fall was in direct conflict. From a consideration of the evidence the court held that the claimant was walking down the stone steps when he tripped and fell, and that there was no negligence on the part of the State which caused his original injury. Debottis v. State, 16 C. C.....	18
On August 9, 1913, the claimant, while returning from the city of Rochester to his home in Gasport, arrived at the lift bridge over the Erie canal at Gasport about 8:30 p. m. It was dark and his automobile lamps were lighted. He never saw or heard any indications that the bridge was raised until he was so near it that it was impossible to avoid a collision. From a consideration of the evidence the Court held that there was no warning given which claimant could hear or see until just as he was about to collide with the bridge; that the automobile has become one of the most important means of conveyance over our public highways, and that in all situations like the one under consideration it is the duty of the State to give some warning which can be seen or heard by a cautious and watchful driver of such machines. Hull v. State, 16 C. C.....	47
Claimant sought to recover damages for personal injuries sustained at night by falling off the north side of the canal bridge where there was no railing. He was walking in the driveway and not in the walkway provided for foot passengers. For ten years he had been constantly using this bridge, knowing that there was no barrier on the north side, and that there was a walk for foot passengers properly guarded on the other side. The Court held that he was guilty of contributory negligence in deliberately choosing to take the roadway provided for vehicles, where there was some risk, instead of taking the walkway provided for foot passengers, which was safe. Schatazle v. State, 16 C. C.....	61
The claimant's intestate, about 9 p. m. on February 3, 1913, attempted to board a car on Main street in the city of Lockport to go to Buffalo. The car failed to stop, and he followed it to where it passed on to the large bridge which the State was building across the Barge canal at Main street, and while still following it he fell through a large hole in the bridge, dropping fifty feet to the rocks below, where he met his death. From a consideration of the evidence the Court held that the State in	

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the construction of the bridge had failed in its duty to guard the excavation in such a manner as to make the bridge reasonably safe for travelers, and that the claimant's intestate was not guilty of contributory negligence in assuming that he might lawfully travel a highway upon which a surface car was proceeding safely a few feet ahead of him.

McDonald v. State, 16 C. C. 83

An employee of the claimant, a building contractor, drove claimant's motor truck across the Nineteenth Street lift bridge over the Erie canal in Watervliet, N. Y. The truck was proceeding in a proper manner and at a speed of less than six miles per hour. The front end of the truck had entirely crossed the bridge, and the rear thereof was still thereon, when some of the wooden timbers, supporting the plank flooring of the bridge, suddenly broke off sharply, and fell into the canal below, and the plank flooring broke underneath the truck, precipitating the latter violently down upon the steel girders of the bridge, several feet below the floor thereof. As a result, the truck and its load were extricated at considerable difficulty and expense, and the truck was materially injured, necessitating various repairs and causing a loss of some days in its use and operation, the total damage amounting to \$398.25. The Court, reviewing the legislation relating to said bridge, held that the bridge was a State bridge, that the State was not only liable for any negligence of its employees in the construction of the bridge but also in its operation and maintenance; and that under the doctrine *res ipsa loquitur* the State was liable. The Court further held that the legislation limiting liability to loads not exceeding eight tons in weight was specifically confined to town bridges, and that the State had thus indicated its intention to exclude from any such limitation its own, or the bridges of any municipal corporation other than a town, that there was a reason for this policy, as obviously a different standard should govern the capacity of rural bridges, subjected only to the loads incident to agricultural and other rural pursuits than that which should control bridges in great cities and large communities, with their varied building, manufacturing and commercial enterprises, and the loads which are incident to their operation. Murray v. State, 16 C. C. 111

The claimant, while driving a horse and covered wagon, started to cross the lift bridge over the Erie canal on Salina street, Syracuse. The bridge started to rise after he was upon it. He hurried to get across the bridge, but when he reached the further edge the bridge was up about two feet. The horse jumped off the bridge, pulling the wagon after him. The wagon tipped over. The claimant and his horse were injured and the wagon was rendered valueless. The Court held from the evidence that the claimant was not properly warned that the bridge was to be raised and that he was allowed to get on the bridge through the negligence of the State's employees, which employees were charged with the duty of protecting the public when the bridge was being raised; that having gotten on the bridge and finding that the bridge was about to go up, the claimant was warranted in trying to get off the bridge as soon as possible and in not taking the chances of remaining high up in the air with his horse and wagon until the bridge was lowered; that under the circumstances

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he was not charged with the same duty of care as he would have been if he had had plenty of time to think and to decide upon the best course. The claim was allowed as to the direct injuries to the claimant and his horse and the loss of his wagon. The Court held, however, that the evidence failed to show that the claimant suffered from a chronic condition alleged to have resulted from the effects of a blow on the head; and refused any award on this score. *France v. State*, 16 C. C. 137

On August 11, 1913, claimant was driving an automobile along State highway No. 27, which is the main traveled route between the Adirondack section and the main east and west highway across the State passing through Utica. It was necessary for her to turn sharply to the northeast to pass over Main street bridge crossing the Black River canal at Boonville, N. Y. Striking the planks near the right side which ran lengthwise on top of the floor, she turned the car sharply to the left and ran against a suspension rod on the left side. With the assistance of several people the car was pulled back, straightened around, the engine cranked, and she got back into the machine. She started the car forward across the bridge, when the bridge structure settled at one corner. Claimant, to avoid tipping over, turned the car "head on" in the direction of the settling. When the bridge struck the edge of the canal bank and stopped, part was on the bank and part in the canal. The car was right side up, tipped sharply forward and directly against the right side of the bridge at its lowest part as it collapsed. The other three corners of the bridge remained substantially in place. Claimant was thrown forward against the wheel and back against the seat and received injuries for which she brought the present claim. The evidence showed that the State had actual notice of the inadequacy of the bridge. The Superintendent of Public Works in 1912 had approved in writing a bill providing for the building of a new bridge and this bill became a law fifteen months before the accident. The Court held that the State was clearly negligent in permitting the use of the bridge under such circumstances, that although the claimant's course when she first came upon the bridge was erratic, nevertheless at the time of the actual falling of the bridge her car was in a proper place and nothing was done by her at that time to cause the bridge to give way and settle down. The manner of the settling of the bridge and the fact that it did not commence to settle where claimant hit the suspension rod disproves the State's contention that the collision of claimant's auto with the suspension rod was a contributing cause of the accident. *Emerson v. State*, 16 C. C. 144

Claimant had for several years traveled between Schenectady and Rotterdam Junction on a forty-passenger auto bus. On April 24, 1915, she, with other people, boarded this bus at Schenectady, paid her fare and became a passenger. While proceeding westerly on a State highway, the bus passed on to the bridge over the Erie canal known as Van Slyke's bridge. The bridge suddenly collapsed, carrying the bus and occupants down about twenty feet to the canal bed, injuring the claimant and other passengers. Six years before the accident the section superintendent in the employ of the Superintendent of Public Works had placed sign boards

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near each end of the bridge. The notice on the sign boards was the usual notice signed by the Superintendent of Public Works that loads of more than two and one-half tons were forbidden to cross the bridge. At the time of the accident one of the signs remained near the Rotterdam end of the bridge, but there was no proof that the sign board at the Schenectady end was in place at that time. From the evidence, including a very careful inspection of the pieces of bridge timbers introduced in evidence as exhibits, the Court held that the bridge was not only unsafe for a two and one-half ton load, but was unsafe for any load, and that the State could have discovered this condition by a proper test, but that no such test was ever made. Claimant had passed over the bridge in this forty-passenger auto bus several times a week for several years, and to all appearances the bridge would hold much more than two and one-half tons, for she had been many times a part of a load much heavier than two and one-half tons which had gone safely over the bridge. The Court held that, whatever the form of the notice, the fact that traffic was not actually stopped over the bridge gave the notice the character of a warning of its not being safe for more than two and one-half tons and could not be taken as a prohibition to use the bridge for more than two and one-half tons. If the Superintendent of Public Works knew or had reason to believe that the bridge was not safe for loads weighing more than two and one-half tons, it was his duty to have a test made and find out what was the actual condition of the bridge. If found to be in a dangerous condition for two and one-half tons or any other usual load which might be expected to pass over such a bridge in such a place, he should cause to be put up signs to attract the attention of all persons who might desire to use the bridge, and then, within a reasonable time, make such repairs, changes or replacements as would make the bridge a proper bridge for the traffic to be accommodated at that locality at that time. Small sign boards placed over to one side of the road and left there for five years do not constitute the kind of protection to which the citizens of this and other States are entitled when they are passing over bridges built, owned and maintained by the State of New York. *Beeman v. State*, 16 C. C. 153

See CATHERINE STREET BRIDGE, SYRACUSE; CHAPEL STREET BRIDGE, LOCKPORT; ERIE STREET BRIDGE, BUFFALO; EXCHANGE STREET BRIDGE, ROCHESTER; PLYMOUTH AVENUE BRIDGE, ROCHESTER; SALINA STREET BRIDGE, SYRACUSE; STATE STREET BRIDGE, BUFFALO; STATE STREET BRIDGE, SYRACUSE; TWENTY-THIRD STREET BRIDGE, WATERVLIET; WEST MAIN STREET BRIDGE, ROCHESTER.

See NEGLIGENCE.

BRIGGS, CHARLES L., v. STATE, 12 C. C. 22.

BRISTOL, WM., by guardian, v. STATE, 11 C. C. 14.

BROWN, HENRY H., v. STATE, 11 C. C. 173.

BROWNLOW, MARY E., v. STATE, 16 C. C. 125

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BUTTERNUT CREEK (ONONDAGA COUNTY).

Where the State without legal right turns water upon the land of another causing all the damages and subsequently other water from natural sources mingles with those of the State, the State must respond for all the damages as the sole source of damage.

Where all the damage to land occurs from natural causes resulting from the overflow of a creek the State is not liable for any damage though without legal right it mingles with the flood surplus water from the canal.

Where part of the damages resulting from flooding are occasioned by water which the State without legal right turns upon the land of another and part are due to the natural overflow of a creek, the State is liable only for such portion of the damages as it actually occasions. *Cook v. State*, 11 C. C. 128.

See CREEKS.

BUTTS ROAD.

Passorelli v. State, 16 C. C. 67

CAMPBELL, PATRICK, v. STATE, 12 C. C. 9.

CANALS.

Where the waters of a creek carry down dirt and gravel and form a bar at the mouth of the creek in the bottom of an abandoned canal, and in time of heavy rain the bar so formed causes the waters of this creek to back up and overflow claimant's property: *Held*, that the creek which overflowed being no part of the canal system of the State, without an enabling act, the Court of Claims had no jurisdiction of the claim. *Freer v. State*, 11 C. C. 9.

Where the State abandons a canal and adjoining owners obstruct the passage of water draining into it so as to cause the water to accumulate and percolate upon adjacent lands, a claim for damages should be dismissed upon the merits where drainage ditches upon the lands alleged to be damaged were allowed to become filled up. *Hughson v. State*, 11 C. C. 37.

Where a canal has been abandoned by the State and damages are occasioned by the use or nonuse which the State makes of the property, the

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claimant must point to some statute wherein the State has consented to assume a liability for its acts. *Hughson v. State*, 11 C. C. 37.

The provisions of the Canal Law (§ 37), allowing claims to be filed by any person sustaining damages from the canals, do not apply to an abandoned canal, like the Chemung canal, not enumerated among the canals to which the Canal Law by section 2 is made to apply. *Hughson v. State*, 11 C. C. 37.

Where a side cut of a canal, although a part of the canal system, has become a nuisance and has actually come into disuse as a part of the canal system, the State may close it as an abandoned canal without rendering itself liable to those who have been using the side cut. The State Constitution prohibiting the sale of the canals extends only to the main trunk as originally constructed, enlarged, or extended and does not apply to a side cut which the State would have the right to close if necessary as a part of its plans for the improvement of the canals of the State. The State may close a side cut which forms no part of the canal system where it was built as a convenience to those owning property on either side of it and was not necessary for the navigation of the canals, although the Legislature assumed jurisdiction over the side cut by making appropriations for its improvement. *Lynch v. State*, 11 C. C. 122.

Prior to the enactment of the Canal Law (L. 1894, ch. 338) there was no provision of law requiring any map to be made or filed or served upon the property owner of lands to be appropriated by the State. *Miller v. State*, 15 C. C. 266.

Prior to the Canal Law (L. 1894, ch. 338) the permanent appropriation of land was complete when the State took possession of the same and if no claim was made within a year after such appropriation the owner lost his interest in the property and the State acquired title in fee. *Miller v. State*, 15 C. C. 266.

History of the statutes preceding the Barge Canal Act of 1903 relating to the appropriation of lands for canal purposes, the procedure under these acts, and the judicial decisions construing them, stated at length. *Adirondack Woolen Co. v. State*, 16 C. C. 1

The language of the early statutes under which the canals of the State were constructed was not always clear, and has not been uniform upon the question of the interest which the State acquired and when the property appropriated became the property of the State, but the decisions themselves have been uniform in holding that the title did not vest until the money had been paid or the appraisal had been made and recorded or the Statute of Limitations had run. The Barge canal act is but a step in the development of legislation on the subject of appropriations, and there is nothing in that act which indicates an intention on the part of the State to change this rule.

Adirondack Woolen Co. v. State, 16 C. C. 1

The contractor under Barge Canal Contract 62 under protest performed work under various alteration orders and extra work orders which increased the expense to it of doing the work under the original contract, and there were also various delays in connection with the work done under the contract resulting from changes made by the State in the

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original plans as the work progressed, from which delays the contractor also claimed damages resulted to it. The various items of damage are passed upon the Referee in his report and opinion.

I. M. Ludington Sons, Inc. v. State, 16 C. C. 175

See BARGE CANAL; BLACK RIVER CANAL; CAYUGA AND SENECA CANAL; CHAMPLAIN CANAL; CHEMUNG CANAL; ERIE CANAL; OSWEGO CANAL.

See LEAKAGE, OVERFLOW AND FLOODING.

CANAL SUPERINTENDENT.

See SUPERINTENDENT OF CANALS.

CANNERY.

See DAMAGE; PERMANENT APPROPRIATION.

CAPITOL.

Waples Co. v. State, 16 C. C. 54

CARHART, HENRY, v. STATE, 11 C. C. 128.

CARHART, HENRY, v. STATE, 12 C. C. 152.

CARROLL, EDWARD, JR., et al. v. STATE, 15 C. C. 241.

CATHERINE STREET BRIDGE (SYRACUSE).

Where a child six years of age was injured, while attempting to get upon a lift bridge which was being lowered, by having his foot caught between the roadway and the bridge, the State is chargeable with negligence, the flagman being absent at the time and the child being of such tender years as not to be chargeable with contributory negligence, and no negligence being attributable to the parents of the child. *Ten Eyck v. State*, 11 C. C. 149.

See BRIDGES.

CHAMPLAIN STONE AND SAND CO. v. STATE, 15 C. C. 181.

CHAPEL STREET BRIDGE (LOCKPORT).

When a person who is riding in a carriage driven by another who drives the horse upon a lift bridge and the horse and carriage are thrown backward off the bridge and the person is injured, such person cannot recover against the State where it is shown that the customary warning signals were given before the bridge was raised, and while the carriage was upon the street approaching the bridge. The officers of the State had performed their duty in giving the signals and the State was not guilty of negligence. *Heard v. State*, 11 C. C. 205.

See BRIDGES.

CHEMUNG CANAL.

The provisions of the Canal Law (§ 37), allowing claims to be filed by any person sustaining damages from the canals, do not apply to an abandoned canal, like the Chemung canal, not enumerated among the canals to which the Canal Law by section 2 is made to apply. *Hughson v. State*, 11 C. C. 37.

See CANALS.

CHEMUNG RIVER DYKE.

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Park v. State, 16 C. C..... 132

CHILDREN.

A boy of eight years held guilty of contributory negligence. Bristol v. State, 11 C. C. 14.

The State was held liable for injuries to a child of six years of age, no negligence being attributable to the child or his parents. Ten Eyck v. State, 11 C. C. 149.

See NEGLIGENCE.

CHITTENANGO CREEK (MADISON COUNTY).

Where damages are claimed for the flooding of land due to the condition of a culvert which obstructed the flow of the water of a creek under the canal, some negligence on the part of the State in maintaining the culvert must be shown to warrant a recovery. Facts and circumstances justifying the dismissal of such a claim reviewed. Lynch and ano. v. State, 12 C. C. 270.

See CREEKS.

CHRISTIAN, JOSEPH, v. STATE, 16 C. C..... 122

CITY OF NEW YORK v. STATE, 16 C. C..... 21

16 C. C. (Appellate Division)..... 315

CLAIM

Claimant was the owner of land along Wood Creek in the town of Rome, Oneida county. On November 8, 1902, he filed a claim to recover damages resulting, as alleged, from the overflow of water in June, 1901, upon said land. There was a substitution of attorneys shortly prior to the beginning of the March, 1915, term of the Court of Claims, and the claim was brought on for trial by the substituted attorneys on March 24, 1915. At the conclusion of the hearing the attorneys for the claimant requested that the matter be held open to permit claimant to introduce further evidence. His attorneys on January 8, 1916, noticed a motion to amend the original claim by alleging another and additional cause of the flood in June, 1901. The court held that even if the present attorneys for claimant had, since their substitution, used due diligence in the prosecution of the claim and in their attempt to have the claim amended, their diligence did not excuse the long delay which actually occurred between the filing of the claim and the motion to amend the same; that the proposed amendment alleged certain facts that ought to have been contained in the original claim or to have been added by amendment within a reasonable time after the original claim was filed; and that it was too late, after the expiration of fourteen and one-half years, to put the burden upon the State of attempting to find witnesses to a condition which should have been brought to the attention of the State more than a dozen years ago. Derrick v. State, 16 C. C..... 59

At the opening of the trial of a claim to recover damages alleged to have resulted from negligence claimant moved to amend her claim by including the necessary allegations to constitute a trespass on the part of the State and its employees, and a like motion was made at the close

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of claimant's case to conform the claim to the proofs. These motions were granted with an exception to the State. <i>Konner v. State</i> , 16 C. C...	92
Upon appeal, the Appellate Division held it was error to grant these motions and dismissed the claim. <i>Konner v. State</i> , 16 C. C.....	320
<i>See CODE OF CIVIL PROCEDURE; CONSENT; ENABLING STATUTE; JURISDICTION; NOTICE OF INTENTION.</i>	

CLIFT, GEO. L., adm., etc., v STATE, 13 C. C. 25.

CODE OF CIVIL PROCEDURE.

By section 264 of the Code of Civil Procedure the Court of Claims has jurisdiction to hear a private claim against the State, but it is likewise true that the sovereign power cannot be sued without its consent. No such consent is shown or pleaded in this claim. No claim in behalf of a citizen can be maintained against the State for injuries occasioned by the negligence or misfeasance of its agent except when it has by legislative enactment assumed such liability. That no enabling act having been passed by the Legislature conferring jurisdiction upon this court to hear and determine the claim of the claimant, the court has no jurisdiction to hear the same. *Dimmock v. State*, 11 C. C. 23.

In order to authorize the consideration of a claim upon its merits by the Court of Claims it must appear not only that the court has had jurisdiction conferred upon it but that the State has consented to have its liability determined. *Quayle v. State*, 11 C. C. 44.

Nussbaum v. State, 11 C. C. 147.

Section 264 of the Code of Civil Procedure as amended in 1908 (chap. 519) confers jurisdiction upon the court over claims in tort constituting "private" claims against the State and grants the consent of the State to have its liability determined in the Court of Claims. *Burks v. State*, 13 C. C. 153.

The term "private" as used in section 264 of the Code of Civil Procedure conferring jurisdiction upon the Court of Claims is used as the antithesis of "public." *Burks v. State*, 13 C. C. 153.

An application to bring in a party under the authority of section 281 of the Code of Civil Procedure should be refused where it appears that the State makes no claim against the party and the party no claim against the State and the only issue being one between the party and the claimant. *Elmore & Hamilton Contracting Co. v. State*, 13 C. C. 401.

Where a statute conferring jurisdiction upon the court of claims provides that the court "has jurisdiction to hear and determine a private claim against the State" but that "the court has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim or some part thereof has been rejected by such tribunal or officer" (Code of Civil Procedure, § 264), the language does not cover a claim like that of an erroneous or illegal state tax or assessment and does not authorize a submission of such a claim to this court. *Flower v. State*, 15 C. C. 164.

See NOTICE OF INTENTION.

COFFERDAM. *See* DAM.

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COLE, DAVID, and ano. v. STATE, 15 C. C. 285.

COMMON CARRIER.

Where the State owned and maintained a reservation and operated an inclined railway exacting a fare for its use by passengers, it is to be treated in its relation to them as a common carrier and is bound to exercise more than ordinary care, and for the absence of such care it is liable, provided the claimant is free from contributory negligence. *Burks v. State*, 13 C. C. 153.

CONCRETE.

See HIGHWAY.

CONNOLLY, PETER F., Co. v. STATE, 16 C. C. 216

CONSENT.

The consent of the State to have its liability determined must be obtained before it can be sued. *Quayle v. State*, affirmed in part 124 A. D. 81; 192 N. Y. 47; 11 C. C. 44.

In order to authorize the consideration of a claim upon its merits by the Court of Claims it must appear not only that the court has had jurisdiction conferred upon it but that the State has consented to have its liability determined. *Quayle v. State*, 11 C. C. 44.

Rice v. State, 11 C. C. 148.

The Court of Claims has no jurisdiction of a claim for services as counsel to the committee on privileges and elections of the Assembly where the State has not consented to have its liability determined by the court. *Nussbaum v. State*, affirmed 119 A. D. 755; appeal dismissed 190 N. Y. 542; 11 C. C. 147.

Consent of State granted in certain cases. Code of Civil Procedure, § 264, as amended by L. 1908, chap. 519.

See JURISDICTION.

CONSTITUTION.

Where a side cut of a canal, although a part of the canal system, has become a nuisance and has come actually into disuse as a part of the canal system, the State may close it as an abandoned canal without rendering itself liable to those who have been using the side cut.

The State Constitution prohibiting the sale of the canals does not apply to a side cut which the State would have the right to close if necessary as a part of its plans for the improvement of the canals of the State.

The State may close a side cut which forms no part of the canal system where it was built as a convenience to those owning property on either side of it and was not necessary for the navigation of the canals, although the legislature assumed jurisdiction over the side cut by making appropriations for its improvement. *Lynch v. State*, 11 C. C. 122.

Chapter 658 of the Laws of 1915, authorizing the Court of Claims to hear, audit and determine the claim of an electrician employed by the State at a State hospital for the insane, for injuries alleged to have

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been sustained by him in the course of his employment, by reason of being struck by a patient, for which the State was not otherwise liable, and further providing that said claim, if found to be valid, shall constitute a legal and valid claim against the State, is constitutional.

Said act does not audit or allow the claim so as to violate section 19 of article 3 of the Constitution, nor does it give or loan money or credit of the State "to or in aid of any association, corporation or private undertaking" in violation of section 9 of article 8 of the Constitution, nor does it appropriate public moneys for local or private purposes within the meaning of section 20 of article 3 of the Constitution. *Munro v. State*, 16 C. C. (Appellate Division) 326

Article 6, section 12, construed. *See Earl v. State*, 13 C. C. 33.

Article 1, section 7. *See Perkins v. State*, 15 C. C. 282.

Article 7, section 6. *See Tuttle v. State*, 16 C. C. 87

See STATUTE; STATUTE OF LIMITATIONS.

CONSTRUCTION.

Where the State passed an enabling statute authorizing the Court of Claims to make an award that "shall be just and equitable notwithstanding the lapse of time since the accruing of such damages or any act or omission which might be deemed a bar to said claim," it thereby waived legal defenses and authorized the adjudication of the claim upon its merits. *Le Strange v. State*, 12 C. C. 249.

See also Munro v. State, 16 C. C. 149

Where confusion exists as to the meaning of words used in the description contained in a grant which requires construction, it is usually resolved against the grantor, who is responsible therefor, as the words used are his own. This is especially so when it relates to a narrow strip, such as half of a street or stream much more valuable to the grantee than to the grantor, as the parties are supposed to have so dealt with the property as to bring out its greatest value. *Hinckley v. State*, 15 C. C. 95.

It is the duty of the court in interpreting statutes to adopt such a construction as will harmonize existing laws, and in case of conflict to adopt such a construction as will be fair and equitable and not produce injustice to those who have acted in good faith under one of them, a construction which will produce the least public inconvenience and will not hamper the officials of the State in the proper discharge of their public duties when acting for the welfare of the State in the protection of its interests and for its benefit. *Kirby v. State*, 15 C. C. 246.

See CONSTITUTION; CONVEYANCE; GRANT; STATUTES.

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A subordinate officer of the State has no power or authority to vary or extend a written contract made between the State and a claimant. A local agent, architect, or division engineer is such a subordinate officer and has no power to vary a contract so as to bind the State. Where additional work or better material than the contract requires is ordered by a subordinate officer, compliance of the contractor must be

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regarded as voluntary service even though the State acquires the benefit by the change. Where one deals with a public officer he is bound to take notice of the scope and limitation of his authority. *Burgard v. State*, 11 C. C. 27.

Where contracts for State printing have been made and the State has not authorized the submission of its liability under such contracts to the Court of Claims, such consent will not be implied from the language of the Code of Civil Procedure conferring jurisdiction upon the court. *Quayle v. State*, 11 C. C. 44.

Where in the sale of certain real estate belonging to the State the claimant alleged that he procured a purchaser for the land in pursuance of an agreement of brokerage with the United States Loan Commissioners of the county of New York. *Held*, that the Loan Commissionerers had no right to make such contract with the purchaser. *Mayer v. State*, 11 C. C. 197.

An enabling act (L. 1900, ch. 519) which permits the submission of a claim against the State to the court and authorizes an award notwithstanding any "act or omission which might be deemed a bar to such claim" waives the defense that the transaction between the claimant's firm and the State at the time of the firm's settlement of the contract amounted to an agreement whereby they adjusted their claim for extra work and also waives the defense that the extra work was not done pursuant to a written order as required by the contract. *Le Strange v. State*, 12 C. C. 249.

The Legislature has the power under the Constitution to waive such defenses and authorize the adjudication of the claim upon its merits stripped of strictly legal defenses. *Le Strange v. State*, 12 C. C. 249.

This court was authorized to make an award to the claimants' firm that "shall be just and equitable notwithstanding the lapse of time since the accruing of such damages or any act or omission which might be deemed a bar to said claim" and upon this basis they are entitled to recover the expense of changing the Potsdam sandstone specified by the contract in the first floor of the capitol to Vermont marble tiling also for substituting Tennessee marble in the second floor for slate which was specified in the contract and for removing and replacing plaster on two floors where it had become damaged through no fault of the claimants' firm particularly since the minds of the parties did not meet upon the terms of the final settlement. *Le Strange v. State*, 12 C. C. 249.

When a State official, having authority to order goods for his department, places an order for a specified number of automobile badges and seals, which were to be delivered from time to time as called for, and before the delivery of the full number ordered, discontinues ordering them from such person and places orders for the same articles, elsewhere, the State is liable for the breach of such contract. *Lang v. State*, 13 C. C. 3.

The measure of damages for the breach of a contract by the State for the manufacture of chauffeur badges and seals where part of the work has been done is the difference between the price that the State was to

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pay for the badges and seals and the amount expended upon their manufacture by the claimant at the time of the breach of the contract and the additional expense necessary to complete them. *Lang v. State*, 13 C. C. 3.

Where claimant's property is flooded by the construction of a cofferdam by a contractor, the flooding resulting from the manner in which the contractor did his work and not arising necessarily out of the contract itself, the contractor and not the State is liable, his relation being that of an independent contractor and the rule being well settled that there is no liability on the part of the State for acts similar to those referred to where it enters into a contract with a competent contractor, doing an independent business, who agrees to furnish materials and labor and make the entire improvement according to specifications prepared in advance for a lump sum or its equivalent, even when it reserves the right to change, inspect and supervise to the extent necessary to produce the result intended by the contract, providing the plant is reasonably safe, the work is lawful and is not a nuisance when completed and there is no interference therewith by State officers which results in injury. *Hunt v. State*, 15 C. C. 145.

Where an expert, under a contract with the Attorney-General to give certain testimony in the so-called Consolidated Gas Case was to receive a stated amount as a retainer and another sum per day while actually engaged, as a preliminary to such testimony, examined the testimony of an expert for the Gas Company, but failed to give testimony of material benefit to the State, as he had promised to do under the contract, he was entitled to recover the sum named as a retainer, said sum becoming due when he accepted testimony of the Gas Company's expert to examine, and began his work, said retainer being a fixed sum, separate from his daily compensation, and in no way dependent upon his future work, or what the result of that work might be, but not the sum per day. *Hough v. State*, 15 C. C. 146.

The State has placed limits upon the power of its officers to contract and incur indebtedness on its behalf. *Logan v. State*, 15 C. C. 161.

See also

Lang v. State, 13 C. C. 3.

National Commercial Bank of Albany v. State, 13 C. C. 239.

Carroll v. State, 15 C. C. 241.

Kirby v. State, 15 C. C. 246.

Where the Attorney-General although having no sum of money specially provided for the purpose, entered into a contract with an attorney to represent the State as special counsel and thereafter the Legislature passed a bill appropriating money to compensate the attorney,—*Held*, that this was a ratification of the contracts made by the Attorney-General acting for the State. *Kirby v. State*, 15 C. C. 246.

Where a contractor engaged in constructing a sewer is, by the authority of a city, in the streets embraced in his contract, for the purpose of building sewers, he has a right to expect that no one, including the State, shall trespass upon his rights without liability for the damages which may be occasioned him thereby. *Cowles v. State*, 15 C. C. 287.

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Where in the course of the construction of a canal natural conditions of soil unexpectedly appear which the contract does not in express terms cover and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract, and substantially affect the work remaining under the contract, and the law will read into the contract an implied condition when it was made that such a contingency shall terminate the entire contract. *Kinzer Construction Co. v. State*, 15 C. C. 326.

Under such circumstances the State is liable for the work actually done at the time of the discovery of the conditions making the performance of the contract impossible; also for material furnished and delivered on the ground but not actually placed in the work; also for the pro rata share of the premium paid on a surety bond required by the contract; but not for loss of profits on work remaining to be done. *Kinzer Construction Co. v. State*, 15 C. C. 326.

Where upon the discovery of such conditions the State instead of immediately regarding the contract as terminated issues a so-called stop order and thereunder the contractor keeps his plant in readiness awaiting the decision of the State, the State is liable for the expense of maintaining the plant during the time during which it might have been used by the contractor. *Kinzer Construction Co. v. State*, 15 C. C. 326.

Where an extensive cave-in occurs in the course of a contract involving the banks and bed of a portion of the canal which the contractor under his contract has agreed to keep in a navigable condition, he is not liable for the expense of restoring navigation where there was no negligence in connection with the performance of his work, the terms of the contract not covering such a contingency. *Kinzer Construction Co. v. State*, 15 C. C. 326.

Interest is allowable upon the amount of work done and unpaid for, the material delivered and the pro rata cost of the surety bond from the time of the termination of the contract on account of impossibility of performance but not upon the amount of the unliquidated damages arising from the issuance of the stop order. *Kinzer Construction Co. v. State*, 15 C. C. 326.

Extra costs of construction; masonry; premium upon bond; overhead expenses; interest. *I. M. Ludington Sons, Inc., v. State* 16 C. C..... 175

Claimant entered into a contract with the State for the improvement of a portion of the Barge canal. One item of work provided for 69,400 cubic yards of wash wall at \$2.50 per cubic yard. A dispute arose as to whether or not the contract, plans and specifications required the contractor to place coping on the top of the wash wall for the price above specified. The Court construed the contract to mean that the claimant was not required to place coping on the wash wall except where shown on the plans and that the claimant having been required to place a coping on the wash wall where it was not shown was entitled to recover the reasonable value thereof.

The Court further held that the clause in the contract providing that in case of any discrepancy or ambiguity in the plans, specifications or maps, or between them, the State Engineer shall make a decision in relation

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thereto which shall be final and conclusive upon the parties had no application in this case as there was no discrepancy or ambiguity. The clause in question relates to work which is required but concerning which some discrepancy or ambiguity exists. It is not the purpose or scope of such a clause to impose work upon a contractor that does not appear upon the plans and cannot reasonably be implied from the plans. It does not confer authority upon the engineer to add additional work and impose unnecessary expense not called for by the contract in express or implied terms. Empire Engineering Corporation v. State, 16 C. C.....	38
Claimant was awarded the contract for cleaning, pointing and waterproofing the exterior stone work of the State Capitol after the fire which occurred on March 29, 1911. Section 9 of the contract contained the following provision: "No charges shall be made by the contractor for any delays or hindrance from any cause during the progress of any portion of the work embraced in the contract."	
Tests made of the material designated by the State for waterproofing demonstrated that the material was unsatisfactory, and after some delay the State designated a substitute preparation. This delay increased the expense of the work to the contractor, for which he sought to recover. The Court held that the failure of the State to designate the kind of waterproofing preparation was in reality an actual interference with the progress of the work; that it was not a delay or hindrance such as is mentioned in section 9, but was in fact a direct act on the part of the State itself which precluded the claimant from using the customary, orderly, and economical methods required in the progress of the work; that the State failed in its duty to designate in due season the kind of waterproofing to be used, and that it should pay the contractor the increased expense resulting therefrom.	
The claimant also sought to recover the expense resulting from the loss of time on the part of his workmen due to an order delivered to the contractor to stop the progress of the work during the sessions of the Court of Impeachment. The Court held that this also was not a delay under section 9 of the contract, but was a direct interference on the part of the State with the progress of the work undertaken by claimant under the contract; that although the stopping of the work was proper and the order was made within the power of the officer issuing it, it did not relieve the State from its liability for the natural and actual consequences of its own act. W. L. Waples Co. v. State, 16 C. C.....	54
Upon appeal, the Appellate Division disallowed the first item of the claim, but allowed the second item. W. L. Waples Co. v. State, 16 C. C. (note)	58
The claimant, a contractor on a highway, sought to recover the cost of iron pipe placed on the work pursuant to the written directions of the engineer in charge of the work but not used. The contractor could not sell the pipe and the State would not pay for it, justifying its refusal by the following provision in the contract: "The said work shall be performed in accordance with the true intent and meaning of the plans and specifications therefor, which are hereby referred to and made a part of this contract, without any further expense of any nature whatsoever	

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to the state than the consideration named in this contract. The state, however, reserves the right to make such additions, deductions or changes as it deems necessary, making an allowance or deduction therefor at the prices named in the proposal for this work, and this contract shall in no way be invalidated thereby; and no claim shall be made by the contractor for any loss of anticipated profits because of any such change, or by reason of any variation between the approximate quantities and the quantities of the work as done."

The Court held that the changes made by the engineer were "deductions"; that the contractor's agreement not to claim anticipated profits left the way open for him to claim such damages as he might suffer from the deduction, exclusive of anticipated profits; that he was not suing for the pipe at \$30 per ton, which would include such profits, but was asking simply to be reimbursed for his disbursements incurred under the engineer's directions; and that under the contract he had not waived his right to recover for such disbursements. *Murray v. State*, 16 C. C. 63

This is a claim against the State for the sum of \$150 for services rendered the State in the month of April, 1914, by the claimant as special agent to the State Board of Tax Commissioners. In July, 1913, he was employed by the commission as such agent at an agreed salary of \$150 per month. He received his pay to and including April 9, 1914, when his services were dispensed with. The check for \$45 which the commission sent him to pay for the nine days in April, 1914, he promptly returned and notified the commissioner each day in that month that he was ready to perform work for the commission, if it would assign any to him. The court, construing certain correspondence between the claimant and the commission, held that the contract of hiring set forth in the correspondence was for what is known as a general and indefinite term, and that under such a contract the employee is liable to be dismissed by his employer at any time without previous notice and that his compensation ceases on the date of his dismissal. The claimant's recovery was therefore limited to \$45. *Quinn v. State*, 16 C. C. 70

Frank S. O'Neil, the claimant, was appointed a member of the Athletic Commission of this State on or about July 26, 1911, and continued as such up to October 8, 1915. In the latter year chapter 680 of the Laws of 1915 was enacted, taking effect May 22, 1915, providing that "Each member of the commission shall be entitled to receive an annual salary of three thousand dollars and his actual necessary traveling and other expenses incurred by him in the performance of his official duties." The Legislature, however, failed to make any appropriation to pay these salaries except an appropriation of \$9,000 for salaries commencing October 1, 1915. The question here involved is as to the right of the claimant to draw a salary for the period from May 22, 1915, to October 1, 1915.

The Court held that when the State, by statute, provides that an official shall receive a salary, that creates a specific and express contract between the State and that official, and is an obligation which cannot be avoided by the State simply because afterwards the Legislature either fails,

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neglects or refuses to make an appropriation to pay that salary. Claimant was therefore held to be entitled to an award for salary at the rate of \$3,000 per annum from and including the twenty-second day of May, 1915, to the first day of October, 1915. *O'Neil v. State*, 16 C. C..... 74

The "information for bidders" in connection with a contract for the construction and improvement of a State highway, contained a provision that where the use of local sand and gravel is anticipated the proposal sheets will give the information as to the location of such material, and further provided that "when such information is not given in the proposals the contractor will be required to furnish approved imported material." The proposed sheets gave no information as to the location of material that could be used, and consequently the duty devolved upon the contractor to furnish "approved imported material."

Expert witnesses were of the opinion that the material was "local" material if it could be reached by the contractor's outfit that was maintained for the purpose of constructing the highway under the contract; and that it was "imported" material if it was such as could be brought in by a common carrier. The Referee, however, refused to adopt this construction, but limited "local" material "to that which is adjacent to the highway," and "imported" material to "material brought in from a place other than where it is to be used, by whatever means, public or private." *Peter F. Connolly Co. v. State* 16 C. C..... 216

The claimant also sought to recover the costs of transportation, etc., to Albany and return for the purpose of conferring with State officials. These conferences pertained chiefly to the negotiations looking toward the changing of the type of road and the question of the claimant taking a new contract therefor. The Referee held that these expenditures were not made in the performance of the contract and therefore disallowed them. *Peter F. Connolly Co. v. State*, 16 C. C..... 216

The monthly estimates of the work performed under a highway contract made by the State's engineers were reported by them to the Commissioner of Highways, together with the final estimate made after the contract had been cancelled and the payments thereon were made by his authority. The Referee held that such report and payment amounted to an acceptance of the work done, both as to its character and material used, and formed the basis upon which the question of profits could properly be determined. *Peter F. Connolly Co. v. State*, 16 C. C..... 216

Claimant contracted to excavate part of a canal prism of the Barge canal along a new route which crossed several railroads, being required to do its work without interfering with railroad traffic. The railroads refused to perform certain construction so as to carry their tracks across the canal or to allow claimant to excavate under or near their tracks. The State officials did not reach any agreement with the railroads as to carrying their tracks over the proposed canal and consequently did not direct claimant to take possession of or excavate the earth under the tracks. Claimant made numerous complaints that it was suffering damages by reason of delays. On claimant's application the State finally canceled the contract, the claimant reserving its claim for damages. The State contended that it had complied with section 4 of the Barge

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canal act and had appropriated the lands required under the tracks and that the State or its contractor had the right to enter and carry out the provisions of the contract. The Referee held: (1) That while it is not the duty of the State to physically dispossess the railroads from the site of the canal, it is its duty to either contract with each railroad to build its own crossing, or to contract with some other person to construct one for it. (2) That as the contract in this case does not require the claimant to construct the abutments of any of the railroad bridges over the canal, but on the contrary prohibited the claimant from interfering with railroad traffic, the claimant could not, therefore, excavate the lands under the tracks until the crossing of the railroads over the canal had been constructed; and it consequently followed that the State was obligated within a reasonable time to provide the claimant with the sites of the railroad companies so that it could perform its contract in excavating the prism of the canal under the railroad tracks. The State failed in this duty toward the claimant, and, therefore, it became liable to the claimant for the damage it had sustained by reason of such failure. Lane Brothers Co. v. State, 16 C. C..... 238

See DAMAGE; EXTRA MATERIAL; EXTRA WORK; GOOD ROADS.

CONTRIBUTORY NEGLIGENCE.

Where claimant's intestate who attempted to cross the Salina Street bridge in the city of Syracuse on a bicycle while the bridge was going up is chargeable with contributory negligence, he cannot recover where it appears by reliable evidence that he was warned before the bridge was raised not to get upon the bridge and again while it was up. Mulvihill, as adm., etc., v. State, 11 C. C. 17.

Where it appeared that the claimant, a boy of eight years of age and upwards, stood deliberately at the end of a lift bridge and placed his foot upon the flagstone on which the iron girders would descend when the bridge was lowered, and the descent of the bridge when lowered was not rapid but required thirty seconds to descend eleven feet; that the descent would have attracted the notice of any person standing near it whose attention was not otherwise engaged; that claimant failed to take that prudence and care which even a child of that age ought to have done; that the descent was slow enough so that if he had noticed the girder even when it was descending to the height of his head or shoulders there was plenty of time to have removed himself from the place of danger: *Held*, that claimant was guilty of contributory negligence and is not entitled to recover for the injury received because of such contributory negligence on his part. Bristol v. State, 11 C. C. 14.

When an employee of the State in charge of a lift bridge over the Erie canal gave warning to claimant intending to cross the bridge that it was about to be raised by giving the warning signal and also the danger signal by swinging his lamp and notwithstanding the warning the claimant, who was riding a bicycle, came upon the bridge, and after he was upon said bridge was again warned to stay on as he had not time to cross before it would be raised, but kept on and rode to the other end of the bridge and was thrown to the pavement below and injured:

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Held, the employees of the State in charge of the bridge were not negligent in operating the same and that claimant, in attempting to cross the bridge after the warning signals had been given and after the bridge tender had warned him not to proceed further, was guilty of contributory negligence and cannot recover. *Gillette v. State*, 11 C. C. 20.

Where a child six years of age was injured, while attempting to get upon a lift bridge which was being lowered, by having his foot caught between the roadway and the bridge, the State is chargeable with negligence, the flagman being absent at the time and the child being of such tender years as not to be chargeable with contributory negligence and no negligence being attributable to the parents of the child. *Ten Eyck v. State*, 11 C. C. 149.

Where an employee of the State is directed to do certain work and has charge of the work to be done, having previously performed similar work, and selects his own tools and appliances and directs their use, the State is not liable if he is injured in the performance of the work. *Ruthenberg v. State*, 11 C. C. 189.

When a person who is riding in a carriage driven by another who drives the horse upon a lift bridge and the horse and carriage are thrown backward off the bridge and the person is injured, such person cannot recover against the State where it is shown that the customary warning signals were given before the bridge was raised and while the carriage was upon the street approaching the bridge. The officers of the State had performed their duty in giving the signals and the State was not guilty of negligence. *Heard v. State*, 11 C. C. 205.

The claimant is guilty of negligence by not observing an obstruction extending into the traveled path when driving a team which had difficulty in drawing a load of apples and pears up a steep approach to a bridge. *Joy v. State*, 12 C. C. 238.

Claimant sought to recover damages for personal injuries sustained at night by falling off the north side of the canal bridge where there was no railing. He was walking in the driveway and not in the walkway provided for foot passengers. For ten years he had been constantly using this bridge knowing that there was no barrier on the north side, and that there was a walk for foot passengers properly guarded on the other side. The Court held that he was guilty of contributory negligence in deliberately choosing to take the roadway provided for vehicles where there was some risk, instead of taking the walkway provided for foot passengers which was safe. *Schatazle v. State*, 16 C. C. 61

The claimant's intestate, about 9 p. m. on February 3, 1913, attempted to board a car on Main street in the city of Lockport to go to Buffalo. The car failed to stop and he followed it to where it passed on to the large bridge which the State was building across the Barge canal at Main street, and while still following it he fell through a large hole in the bridge, dropping fifty feet to the rocks below where he met his death. From a consideration of the evidence the Court held that the State in the construction of the bridge had failed in its duty to guard the excavation in such a manner as to make the bridge reasonably safe for travelers, and that the claimant's intestate was not guilty of contributory negli-

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gence in assuming that he might lawfully travel a highway upon which a surface car was proceeding safely a few feet ahead of him. McDonald v. State, 16 C. O. 83

During the progress of the State Fair at Syracuse in 1912, in preparation for a pageant arranged to take place alongside of the Erie canal at North Salina street in that city, a lift bridge over the canal was raised and temporarily made stationary. The claimant was a child twelve years old, who participated in the exercises. At their conclusion it was necessary for her to cross the canal on the bridge in order to reach her home. At the conclusion of the pageant the bridge was being lowered when the claimant was forced forward by the crowd in such a manner that her foot was caught under the bridge and she sustained the injury complained of.

The court held that the claimant was not negligent. She was where she had a right to be and where necessity compelled her to be. She had a right to assume that the State would fulfill its duty to protect her. She was powerless to resist the action of the crowd behind her and no blame can attach to her action at the time of the accident. Slive v. State, 16 C. C. 96

See NEGLIGENCE.

CONVEYANCE.

Under the well settled law of the State where an intention to the contrary does not appear from the terms of the conveyance, a description of a riparian estate by which the line runs to a monument on the bank and thence "on," "to," "along" or "down" the river carries title to the thread of the stream, the monument merely determining the direction of the line toward the river. Fulton Light, Heat & Power Co. v. State, 13 C. C. 285.

A conveyance of land bounded by a non-navigable stream carries title to the center thereof unless the parties restrict their grant to the shore line in very plain and express words. Hinckley v. State, 15 C. C. 95.

See Johnson v. State, 13 C. C. 255.

See GRANT.

COOK, OLIVER W., v. STATE, 11 C. C. 128.

COOLIDGE, FRANK, v. STATE, 11 C. C. 200.

COSBY MANOR GRANT. *See GRANT.*

COUNTIES.

See County of Schenectady v. State, 13 C. C. 209.

COURT OF APPEALS.

In a claim filed to recover for the unpaid salary of a judge of the Court of Appeals who had been retired from the bench by reason of having passed the age limit of seventy years and who had served in such capacity for ten years or more, and whose term of office for which he had been elected not having expired at the time of his death, and in which claim the executors sought to recover the salary for the full term extend-

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ing beyond the death of the testator: *Held*, that the Constitution, § 12, art. 6, should not be so construed that salaries should be payable after the death of a judge who had been retired under its provisions, and that all obligations of the State for such payment ceased at death, and that claimant could only recover the amount of unpaid salary at the time of death of the testator. *Earl v. State*, 13 C. C. 33.

See JUDGE OF COURT OF APPEALS.

COWLES, HORACE N., v. STATE, 15 C. C. 287.

CREEK. *See* BUTTERNUT CREEK; CHITTENANGO CREEK; GLENN CREEK; LIMESTONE CREEK; OAK ORCHARD CREEK.

CULVERT.

Where damages are claimed for the flooding of land due to the condition of a culvert which obstructed the flow of the water of a creek under the canal some negligence on the part of the State in maintaining the culvert must be shown to warrant a recovery. *Lynch and ano. v. State*, 12 C. C. 270.

Where it appears that a culvert for carrying away waters of a stream in times of flood was not improperly constructed, and that it was of sufficient capacity to take care of all ordinary rains and such as naturally would be expected in the locality, the State is not liable for damages resulting from the failure of the culvert to carry off the water resulting from the fall of rain during an unusual storm. *New England Brick Co. v. State*, 15 C. C. 313.

Where it appears that a culvert for carrying off the waters of a stream in times of flood has been kept free and clear of obstructions by the State, and it further appears that the claimant has been in the habit of dumping refuse wood and brick on the banks of the creek, a portion of which during an unusual storm washed down stream against the culvert, the State cannot be held liable for damages resulting to the claimant from flooding of the claimant's premises, due to the choking of the culvert by the washing down of the material against it. *New England Brick Co. v. State*, 15 C. C. 313.

See also I. M. Ludington Sons, Inc. v. State, 16 C. C. 175

CUYKENDALL, CHARLES, v. STATE, 11 C. C. 143.

DALEY, PATRICK B., & ANO. v. STATE, 13 C. C. 30.

DAM.

Where a dam was constructed in 1865 and flash boards had been used thereon ever since and no claim for flooding resulting therefrom was made by claimant until 1901 the claim is not tenable, as under the Revised Statutes (§§ 48, 52), and Laws 1830, chapter 293, and Laws 1866, chapter 836, the State acquired a permanent easement to flood the land after the lapse of one year from the time the premises were flooded. *Ely v. State*, 11 C. C. 65.

Kline v. State, 11 C. C. 83.

Smith & Powell Co. v. State, 11 C. C. 87.

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Appropriation of dam by State and easement to flood. *Hall v. State*, 11 C. C. 109.

Where the State arbitrarily maintains during the entire year flash boards which it had been the practice to remove at the close of navigation, it is liable for the injuries occasioned thereby. *Cuykendall v. State*, 11 C. C. 143.

Where flash boards had been removed usually at the close of each season of navigation and a canal superintendent without special authority maintained the flash boards during the entire year, the State is liable for his acts under the rule that it is liable for the tortious acts of its agents even where they were done in good faith in pursuance of the general authority to act on the subject to which they related. *Cuykendall v. State*, 11 C. C. 143.

Dennis v. State, 11 C. C. 143.

When in 1880 the State constructed a dam at the foot of Sixth lake and the owners of land flooded filed a claim against the State, and an award was made against the State for the flooding of all lands that would be flooded by a dam at the foot of said lake with a flow line ten and one-half feet above the apron of the dam and the State paid the award: *Held*, that the State has acquired the right to maintain a dam the flow line of which should not exceed ten and one-half feet above the apron of the dam, and that in case of floods raising the general surface of the lake to a higher level, the State was not liable. *Rowe v. State*, 11 C. C. 165.

Where claimant's property is flooded by the construction of a cofferdam by a contractor, the flooding resulting from the manner in which the contractor did his work and not arising necessarily out of the contract itself, the contractor and not the State is liable, his relation being that of an independent contractor. *Hunt v. State*, 15 C. C. 145.

Cofferdam; pumping, bailing and draining. *I. M. Ludington Sons, Inc., v. State*, 16 C. C. 175

DAMAGE.

Where the State within legal rights turns water upon the land of another causing all the damages and subsequently other water from natural sources mingles with those of the State, the State must respond for all of the damages as the sole source of damage. Where all the damage to land occurs from natural causes resulting from the overflow of a creek, the State is not liable for any damage though without legal right it mingles with the flood surplus water from the canal. Where part of the damages resulting from flooding are occasioned by waters which the State without legal rights turns upon the land of another and part are due to the natural overflow of a creek, the State is liable only for such portion of the damages as it actually occasions. *Carhart v. State*, 11 C. C. 128.

Cook v. State, 11 C. C. 128.

Lasher v. State, 11 C. C. 128.

The evidence of damages is to guide and not to control the court in arriving at its award, and where witnesses on the part of the owner testify that certain water power is worth \$34,000 and the witnesses on

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behalf of the State testify that it is worth nothing, the court may make such an award between these estimates as it may deem proper. *Hall v. State*, 11 C. C. 109.

The State must respond in damages where it negligently turns water upon the land of another, which water would not naturally, without the intervention of the State, have found its way there, and thereby causes damages, but where the State turns water upon the land of another, which land was flooded and damaged previously from natural causes, the State is not liable where all of the damages were occasioned before the State's trespass even though without legal right it mingles surplus water from the canal with the flood water. Where the State negligently turns water from a feeder upon the land of another where it mingles with flood waters from a creek and together causes damages, the State is not liable for all of the damages occasioned but only for such portion as it actually causes.

Ostrander, J. N., v. State, 11 C. C. 175.

Ostrander, Charles, v. State, 11 C. C. 72.

Acer v. State, 11 C. C. 72.

Post v. State, 11 C. C. 72.

A claim for damages for seepage from the canal cannot be dismissed although it is evident that the wet condition of the premises is due to other causes, where it appears from the evidence that there is some seepage, however slight, from the canal. *Brown v. State*, 11 C. C. 173.

Where a claim is for permanent appropriation and there is no question of benefit involved, the compensation may be measured by the difference in the value of the property before and after the taking or by the value of the land taken plus the damages to the remainder. *Bonneville v. State*, 12 C. C. 173.

The measure of damages for which the State is liable in the case of the destruction of a canal boat and other property destroyed to restore navigation after a break is the value of the property after the break, eliminating all damages due to the break itself. *Foote v. State*, 12 C. C. 55.

When the State negligently occasions part of the flooding and a portion of the damages and a part is caused by natural causes the State is liable only for its share of the damages, but where the State occasions all the flooding and causes all the damages it must respond to the full extent of the injury. *Harris v. State*, 12 C. C. 22.

Where willow roots have been destroyed through the negligent flooding of land by the State the measure of damages is the difference of the market value of the land with and without the willows. Where the crop has been destroyed, but the willows have not been destroyed, the damages are the value of the crop impaired or destroyed because the State may cease to trespass at any time. *Keith v. State*, 12 C. C. 144.

The measure of the damages is the value of the property destroyed at the time of its destruction. *Town of Lennox v. State*, 12 C. C. 159.

See Carhart v. State, 12 C. C. 152.

Gray v. State, 12 C. C. 71.

McDonald v. State, 12 C. C. 79.

Zimmerman v. State, 12 C. C. 88.

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Where premises in a 'somewhat deteriorated condition are flooded through the negligent acts of the State causing damages to the structures and a loss of rents, the owner of the premises is entitled to the cost of making reasonable repairs to put his premises in a tenantable condition and to the loss of rents occasioned by the negligent acts of the State. In such a case the owner is not entitled to the diminution in the market value of the premises in addition to the cost of making repairs and the loss of rents. *Stevens v. State*, 13 C. C. 111.

If one claims damages for an injury resulting in alleged permanent physical impairment, it is incumbent on the claimant to prove such permanent physical impairment is the result of the injury received. *Hynes v. State*, 13 C. C. 49.

The State having taken certain adjacent land for canal purposes, the courts may not compel it to take additional lands which may be flooded if the high navigable stage of the canal should ever be reached, and such lands not being necessary for ordinary use and their flooding being only a possibility or contingency, the damage thereto is speculative and not to be considered in fixing the award for the lands taken. *Johnson v. State*, 13 C. C. 55.

Where the State appropriates a municipal building in a village for the Barge canal its value will not be based upon the cost of reproducing the building nor upon its value to the village, but upon the market value of the property in the condition in which it was at the time of the appropriation. *Village of Whitehall v. State*, 13 C. C. 139.

While it is proper to receive evidence as to the quantity of moulding sand on a farm and the availability of the frontage of the farm for building lots as bearing upon the value of the farm the compensation for the taking of the farm is to be estimated by the market value of the property. *Gregg v. State*, 13 C. C. 38.

The measure of damages, for the breach of a contract by the State for the manufacture of chauffeur badges and seals where part of the work has been done, is the difference between the price that the State was to pay for the badges and seals and the amount expended upon their manufacture by the claimant at the time of the breach of the contract and the additional expense necessary to complete them. *Lang v. State*, 13 C. C. 3.

As to the rule of damages to be applied in appropriation cases, *Held*, that the owner is not limited in compensation to the use which he makes or has made of his property, but is entitled to receive its greatest value for any purposes for which it is naturally adapted. He is, however, limited to its market value, and in determining such value he may show its location, its surroundings and adaptability, and if it has been rented he may show the fact, although the rent received is not to be deemed as controlling upon the question of value, but as some evidence bearing thereon. *Palmer v. State*, 15 C. C. 55.

Also, that in determining the value of land appropriated for public purposes, the same conditions are to be regarded as in the sale of property to private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses

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to which it is plainly adapted, but what it is worth from its availability for valuable uses. The property is not to be deemed worthless because the owner allows it to go to waste or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it serve the necessities or conveniences of life. *Palmer v. State*, 15 C. C. 55.

The profits of a business are a guide, valuable but not conclusive, in determining the value of the property and plant which produced them. *Lincoln Spring Co. v. State*, 15 C. C. 81.

While certainty is the general rule in estimating values, probability must of necessity sometimes be taken into consideration. When, owing to inherent and insurmountable conditions, the exact facts upon which value depends cannot be proved, reasonable probabilities cannot be disregarded, for the owner is entitled to rely on anything that enters into the market value. Market value means the fair value of the property as between one who wants to purchase and one who wants to sell. A reasonable probability that a fact exists, although it cannot be proved, which, if it exists, would add largely to the value of certain property, adds to the market value of that property, even if the probability is not strong enough to warrant a finding that the fact does exist. *Lincoln Spring Co. v. State*, 15 C. C. 81.

The owner of land taken in condemnation cannot recover a larger price for his property owing to the use which the State intends to make of similar lands nearby taken or purchased at about the same time for the same purpose. Such a rule of damages would penalize government in a progressive ratio for making a public improvement by increasing the price of the land needed as each parcel was acquired for public use. *Lincoln Spring Co. v. State*, 15 C. C. 81.

As to the damages recoverable where land is permanently appropriated by the State, *Held*, that the claimants are entitled to recover the market value of the property appropriated estimated according to the condition of the title at the date of appropriation, as well as the damages caused to the remainder of their property not appropriated. Hence a flowage and booming easement granted by an early deed from the original proprietors of the land and an easement in the public for highway purposes are to be taken into account. *Hinckley v. State*, 15 C. C. 95.

Where the whole property is appropriated and benefits are not involved the method for ascertaining the damages so far as the owner is concerned, is to estimate the market value of the property at the time of the appropriation taking into account all improvements upon it which form a part of the realty whether made by the owner or the tenant. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

In such a case where the rent reserved for the unexpired term equals or exceeds the market value there are no damages to the tenant but where the rent reserved is less than the market value of the lease for the unexpired term the tenant is entitled to the difference between the market value of the lease and the rent reserved. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

Where only part of the leased property is taken the question so far as the owner is concerned is, where benefits are not involved, what was

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the market value of the property immediately before and immediately after the appropriation taking into account the character of the public improvement to be made and the structures placed upon the property either by the owner or by the tenant which form a part of the realty. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

Where only part of the leased property is taken the question, so far as the lessee is concerned is, what was the lease worth in the market immediately before and immediately after the appropriation taking the same elements into consideration as in the case of the owner with reference to the public improvement and the structures placed upon the property. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

Where property taken is subject to a lease or other incumbrance the value of the lease or incumbrance or where part of the property is taken, the damages to the lease or incumbrance, must come out of the compensation allowed for the fee. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

Where part only of premises is taken and there is no question of benefits involved, the compensation to be awarded a claimant may be measured either by the difference in the market value of the property before and after the appropriation or by the market value of the part actually taken plus the damages to the remainder of the property, of which the appropriated land formed a part. *Lehigh Valley Railway Co. v. State*, 15 C. C. 226.

Where benefits are involved the better rule is to ascertain the value of the property taken, which amount at least must be allowed and then determine the damages to the balance of the property, offsetting against these damages any benefits from the improvement. *Lehigh Valley Railway Co. v. State*, 15 C. C. 226.

Where the State appropriated land upon which were a house, barn, boathouse and hogpens, the land appropriated being used for the renting of boats, *Held*, that the fact that the property was available and used for the renting of boats could be taken into account in estimating the value of the property, but the claimant could not be allowed damages for loss of business or loss of profits. *Vincent v. State*, 15 C. C. 229.

Where part of a farm suitable for the raising of potatoes is appropriated by the State, and the estimates of damage of the claimant's witnesses seem to be largely based upon the productive capacity of the appropriated land, *Held*, that in this respect the testimony is not entirely reliable, for while the productive capacity may be considered, it is not a sole test of the value of the property, and also, that while the claimant may have made a high net profit per acre from the land appropriated, the same investment on other land might yield more than that amount and the personal element of labor and skill and the exigencies of the seasons make the net profit unreliable as a sole test of value. *Flannigan v. State*, 15 C. C. 263.

Where the owner of property and his tenant's assignee appeared in court and consented that their respective claims against the State and each other be determined, *Held*, that the owner was entitled to the value of the premises less the value of the lease, and the lessee's assignee was

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entitled to the value of the leasehold, which as no witnesses were produced by the State, was estimated to be the difference between the rental value, as testified by the claimants' witnesses, for the unexpired term over and above the rent reserved, deducting the water tax which the lessee was obliged to pay. *Riley v. State*, 15 C. C. 277.

Osley v. State, 15 C. C. 277.

Where the State appropriated land for the barge canal and thereby cut off the claimant's access to the public highway, *Held*, that the value of the land taken did not represent the damages which the claimants had sustained, for they were entitled to the damage that the remainder of the farm may have sustained as a result of the deprivation of the farm from access to the public highway. *Guerin v. State*, 15 C. C. 279.

The net income received is not the sole criterion for estimating the value of property appropriated, although it may be taken into account. *Guerin v. State*, 15 C. C. 279.

Where the State, for Barge canal purposes, appropriates land constituting part of a farm, which appropriation divides the farm into two parts, one part of which is cut off from access to the highway and has no outlet, the claimant is entitled to the market value of the land taken, including whatever in the nature of realty was attached to the land, and is also entitled to a substantial allowance for damages to the property cut off from access to the highway. *Perkins v. State*, 15 C. C. 282.

The want of ingress and egress to land cut off by an appropriation is a serious element in determining the damages to which the claimant is entitled. In fixing this amount there should be taken into account the fact that a complete scheme for securing a private right of way is provided for in the statutes of the State pursuant to the Constitution (Constitution, art. 1, § 7; Highway Law, L. 1909, ch. 30, §§ 211-228); and that the expense of these proceedings would be quite large. In addition to this consideration, where, even with a private right of way, the claimant will be seriously inconvenienced in operating his farm by being compelled to travel a considerable distance further to reach his buildings, this item is also to be taken into account in estimating the damages. *Perkins v. State*, 15 C. C. 282.

Where the State appropriated land upon which were buildings, erected by tenants under a lease whereby they had the right to remove the buildings at the expiration of the lease, *Held*, That the interest of the tenants is the market value of their lease, taking into account all of its items, including the buildings and any other property in the nature of realty they had attached to the soil. The award to the owner is for the value of the fee, which includes structures in the nature of realty attached to the soil. The compensation awarded for the fee must include an amount sufficient to compensate the tenants for the value of their lease including the buildings and other property in the nature of realty they had placed upon the land. The difference between the market value of the fee and the market value of the lease, taking all the elements into account will measure the compensation of the owner. The balance will be the compensation to which the tenants are entitled.

Rourk v. State, 15 C. C. 285.

Cole v. State, 15 C. C. 285.

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The State is liable only for damages caused by its own negligent acts, or to put the statement in another form, where damages are claimed for leakage from the canal, it is not liable if the damages claimed to have been suffered by leakage would have occurred notwithstanding its negligence. *Cowles v. State*, 15 C. C. 287.

Where the proof clearly shows that the State was negligent in the care of the canal bank and that water came through the break and actually invaded the trenches and works of the claimant, a contractor engaged in building a sewer, and caused him considerable damage, the claimant should be allowed the damages which he has proven were caused thereby. *Cowles v. State*, 15 C. C. 287.

Where the State appropriated property consisting of a hotel, barn and other buildings the claimant was held entitled to recover only the market value of the property, even though it would be difficult, if not impossible for him to utilize that amount in such a way that he would receive the same income therefrom as he had been receiving from the land appropriated by the State. *Smith v. State*, 15 C. C. 293.

A claimant is not entitled to any allowance for the business conducted upon the property appropriated although this fact may be considered in connection with estimating the value of the property. *Milton v. State*, 15 C. C. 300.

Where the State appropriates a block, part of which is occupied by tenants in possession under a written lease, the total amount of damages for which the state is liable is the market value of the premises, out of which must come the leasehold interest. *McFadden v. State*, 15 C. C. 305.

Fowler v. State, 15 C. C. 305.

In a claim for damage from leakage, where it appeared that former recoveries had been had for the same alleged negligence on the part of the State, and the Court was satisfied that the claimant had not exerted himself to avoid the recurrence of damages, and where the testimony was of a somewhat general nature and claimant's books, which he asserted showed his losses in rent, were not in court, and no tenant was sworn to show he had moved out of claimant's premises because of their wet condition, and as only a slight expense was required to obviate any further damage, *Held*, That an award for a small sum was sufficient to cover all the damages for which the State should respond, and it was the duty of the claimant to use all reasonable measures to reduce his damages as much as possible. *Stevens v. State*, 15 C. C. 301.

Where land appropriated by the State had formerly been part of a farm and had upon it a first growth of timber, it is to be treated as farm land in arriving at its value, the timber, however, being an item to be considered with the other elements, although it is not to control nor form the basis for estimating the compensation. The rule to be followed in such a case is "what was the value of the farm before the appropriation and after the appropriation, taking into account the nature of the soil and the condition of the farm." *Stevens v. State*, 15 C. C. 304.

Where land and trees are appropriated, it is not proper in appraising the property to estimate its value by placing a separate value upon each

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tree taken and upon the land. The recognized rule is to appraise the market value by estimating the difference in the market value of the land with and without the trees as a part of it. Some trees have a market value apart from the land, like nursery stock or forest trees good for cutting up into lumber, but ordinarily a tree has a market value only as a part of the soil, and as such it can only be estimated in connection with the soil. It is real estate and there is no rule which allows of its appraisal in these proceedings as if it were removable from the soil and salable as such. *Bell v. State*, 15 C. C. 316.

The proper rule for estimating the value of land actually taken is to arrive at its market value. The damages are measured by what a willing buyer would pay a willing seller for it. The fact that the State forces the claimant to surrender his land is not to be taken into account in enhancing the damages. Where the State forces the claimant to surrender his land, it is exercising a right of sovereignty which it has always had. Every citizen holds his land subject to the right of the state to take it back for necessary public purposes. He holds it by virtue of the protection given him by his government and must surrender it when needed for necessary public purposes upon receiving just compensation, and this compensation is not to be enhanced by the fact that he is called upon to surrender the land the title to which originally was in the State. *Bell v. State*, 15 C. C. 316.

The just compensation to be made to claimants in cases of this character may be measured by the difference in the value of the property before and after the appropriation, where the question of benefits does not come into play; but where benefits are involved it must be measured by adding to the market value of the land taken, the damages to the remainder of the property, deducting benefits, if there are any, from the damages to the remainder of the property. *Bell v. State*, 15 C. C. 316.

The State is not liable for damages to abutting property for closing a canal bridge pending repairs where it appears that the repairs were made with reasonable dispatch considering the circumstances. *Kline v. State*, 15 C. C. 366.

The claimant made a contract with the State for dredging and for constructing a lock and a dam. After the work had progressed to a certain point, the State changed the style of construction of the dam, and by two alterations required the contractor to make certain changes which involved additional expense, for which compensation is claimed.

Claimant was allowed the additional cost of constructing coffer dams, pumping, bailing and draining, over and above the amount needed to complete the dam as originally planned, the contractor having bid a flat sum for this work. The Court held that the measure of damages was not the cost to the contractor of doing the work, but the fair and reasonable value of the work.

During the delay of the State while deciding upon the changes in the original plans, a portion of the excavation previously made became filled up without the fault of the contractor. For re-excavating this material he was allowed compensation at the rate provided in the contract.

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Claimant was also allowed the cost to him of metal reinforcement for concrete construction which he was unable to use because of change in plans, less the salvage. *Patrick McGovern & Co. v. State*, 16 C. C. 37

An award was made for land appropriated and for three small frame buildings on the land. The Court held, however, that the evidence was insufficient to justify an award for the loss of a mineral spring on the land and two gas wells. The proofs as to the successful operation of the business of selling mineral water were very unsatisfactory; furthermore, the decedent had, before the appropriation was made, made a gift of the mineral spring to a son, since deceased, and if there had been any profit in the operation of the mineral spring it did not belong to the claimants. As to the gas wells, a consideration of the entire testimony showed that little, if any, gas had been used from the wells at the time of the appropriation. *Knight v. State*, 16 C. C. 66

The land appropriated was a long narrow strip in the city of Oswego on the line of the Oswego canal along the edge of the Oswego river. The claimant contended that its value should be based on "lot values" and that these lots would be specially desirable, as they fronted on a State highway, had Oswego river at the back, were forty feet above the river and commanded a beautiful view across and beyond the river.

The Court held that, while it would have been feasible at the time of the appropriation to divide this property into lots and put it on the market so divided, it could not be regarded as having had an immediate sale value at that time for all the lots so plotted; that the reasonable market value of the property was not based upon desirability alone but upon desirability plus probability, direction, speed and opportunity for city growth; that there was a great deal of desirable land similarly situated in and about Oswego, and that taking all these elements into consideration \$3,000 was a fair measure of the reasonable market value of the land as a whole at the time of the appropriation even if it were to be cut up into lots. *Battle Island Power Co. v. State*, 16 C. C. 120

Claimants' farm extended along Wood creek in Oneida county for about one and one-third miles. This creek overflowed this land each year, depositing a fertilizing silt on the farm. The State, in the construction of the Barge canal, cut off this creek from the farm, stopping this annual fertilization and also depriving the farm of a substantial running stream which was valuable for the use of the stock thereon.

The State set up the defense that Wood creek carried the sewage of the city of Rome, and that therefore it had no value as a watering place for stock. The Court held, however, that in view of the circumstances that it was generally and well known in that locality that the city of Rome had been and was continuing to take steps looking toward the establishment of a sewage disposal plant, there had not been, as a matter of fact, a very great depreciation in the values of land along the creek; that when the sewerage into the creek is stopped and the creek gets back to its normal condition it will be a valuable asset to this farm for stock watering purposes; and that the present use of the creek for sewerage purposes, while it has some bearing on the present value of the adjacent lands, does not materially mitigate the damage to this farm caused by the permanent taking of the entire flow of the stream.

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Wood creek formed a natural cattle barrier across one entire end of the farm. The Court held that the fact that the water, being taken from the creek, will require the owner to fence his farm, should be and was taken into consideration as an element of damage in the award made in this claim. *Kilts v. State*, 16 C. C. 129

The State, under certain legislative acts, erected a dyke on the south side of the Chemung river in the city of Corning along a portion of claimant's farm. During the periods of heavy spring and fall floods the water had previously overflowed the south bank, but the dyke since its erection had confined the water to the river channel thus causing it to run more swiftly. This condition piled up a gravel island or bar below the end of the dyke and caused a gradual change of current in the river. The bank on the north side of the river being high, the water crowded towards the south bank and slowly cut away the low slope, later the normal bank and finally the tillable land beyond. The portion of the farm beyond the end of the dyke, about thirty-five acres in extent, was subjected to considerable current when the water was high, which current washed away the top soil. Because of this condition this part of the farm several years ago was turned into a meadow and finally into a pasture.

The cutting of the high bank commenced in 1901 but the notice of intention to file the claim was not filed until March 15, 1912. The Court held that the State had, by the faulty design and construction of the dyke, interfered with the natural channel and flow of the river, that the State may or may not have owed a duty to build a dyke, but, having built it, the State must assume any damages arising from the failure to build it properly, but that inasmuch as the notice of intention was not filed until March 15, 1912, the claimant could recover only those damages which had occurred from September 15, 1911.

It was held that the measure of damage to claimant because of the cutting off of her land by the river was the depreciation in the fair market value of her farm between September 15, 1911, and the date of the trial; that in addition the claimant was entitled to the annual rental value of the said thirty-five acre piece less the rental value for the purposes for which it could now reasonably be used in the course of good husbandry, being subject to such a current.

The balance of claimant's farm was flooded by back water, but the Court found that this back water condition was present before the dyke was constructed and no award was made for any damage for such back water flooding. *Park v. State*, 16 C. C. 132

The State appropriated land south of claimant's cannery for the Delta reservoir, which land had been used for unloading and storage purposes. The State also appropriated about four and one-third square miles in the vicinity of the buildings, not owned by claimant but from which about four-fifths of the raw material for the cannery was obtained. The claimant asked damages for substantially the entire value of the plant. The Court held that the land actually taken on the south, and belonging to the claimant, was worth \$200 an acre; that the cost of rearranging the machinery to handle the raw material from the north instead of from

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the south would have been \$1,500; and that the cost of making the lands to the north suitable for the same purposes for which the lands to the south had been used would have been \$500. A claim for the rusting of cans because of bringing water so near the buildings was disallowed as having no basis of fact. The Court also held that the State was not liable for the damage claimant sustained by being deprived of raw material. Had a private individual acquired the lands from which the raw material was produced and used them for other purposes, he would not have been liable. No allowance was made for any loss on buildings or machinery. From the time of the appropriation to the viewing of the premises by the Court, nearly five and one-half years, the machinery had been allowed to become rusty and go to pieces and become practically useless. It was the claimant's duty to dispose of the machinery and make such use of the buildings or materials thereof as would reduce the damages which flowed from the stopping of cannery operations and the abandoning of its property. It was not necessary to estimate what salvage should have been made at the time of the appropriation as the State was not legally liable for the stoppage of the business and the abandonment of the plant. *Mohawk Valley Canning Co. v. State*, 16 C. C. 139

The claimant, a married woman living with her family and doing the housework, was severely injured. She suffered a fractured skull, had teeth knocked out, received a large deep tear in the forearm and other injuries. An award was made to her in the sum of \$3,500. *Beeman v. State*, 16 C. C. 153

The claimant in making its bid on a highway contract, is presumed to have taken into consideration the cost of labor, its overhead expenses, the amount of premium to be paid upon its bonds and the cost of installing its plant and to have made the same sufficiently large to reimburse itself therefor out of the profits. The profits having been determined and adjudged, all items of damage of the character of those above specified have merged therein. *Peter F. Connolly Co. v. State*, 16 C. C. 216

The claimant in a highway contract sought to recover the costs of transportation, etc., to Albany and return, for the purpose of conferring with State officials. These conferences pertained chiefly to the negotiations looking toward the changing of the type of road and the question of the claimant taking a new contract therefor. The Referee held that these expenditures were not made in the performance of the contract and therefore disallowed them. *Peter F. Connolly Co. v. State*, 16 C. C. 216

DAVIES, MARIAN, v. STATE, 16 C. C. 115

See CONTRACT.

DEBOTTIS, FRANK, v. STATE, 16 C. C. 18

DELTA RESERVOIR APPROPRIATION.

Mohawk Valley Canning Co. v. State, 16 C. C. 139

DENNIS, DAVID S., v. STATE, 11 C. C. 143.

DERRICK, JOSEPH, v. STATE, 16 C. C. 59

DIMMOCK, WILLIAM, v. STATE, 11 C. C. 23.

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DREDGE.

Where there are open and well known defects in the appliances with which a claimant is working and the place where he is called upon to do his work is unsafe, he is not chargeable with negligence if he remains until injured if he has been promised a reasonable time before the accident that the defects would be remedied and remain relying on these promises. *Post v. State*, 13 C. C. 99.

DUFFY, WALTER B., v. STATE, 11 C. C. 182.

EARL, ROBERT, ET AL. v. STATE, 13 C. C. 33.

EASEMENT.

Where a dam was constructed in 1865 and flash boards had been used thereon ever since and no claim for flooding resulting therefrom was made until 1896 the claim is not tenable, as under the Revised Statutes (§§ 48, 52), and Laws 1830, chapter 293, Laws 1866, chapter 836, the State acquired a permanent easement to flood the lands within one year after the premises had been flooded. *Kline v. State*, 11 C. C. 83.

Where a permanent easement to flood lands has been acquired under the statutes (Revised Statutes, §§ 48, 52, Laws 1830, chapter 293, Laws 1866, chapter 836), any claim for damages resulting from the flooding was not revived by Laws 1870, chapter 321, which applied only to a class of claims which had not been provided for previously. *Kline v. State*, 11 C. C. 83.

Where a dam was constructed in 1865 and flash boards had been used thereon ever since and no claim for flooding resulting therefrom was made by claimant until 1900 the claim is not tenable, as under the Revised Statutes (§§ 48, 52), and Laws 1830, chapter 293, and Laws 1866, chapter 836, the State acquired a permanent easement to flood the lands within one year after the premises had been flooded. *Smith & Powell Co. v. State*, 11 C. C. 87.

Interruption in the continuity of the user of flash boards does not affect the right to an easement acquired under the statutes unless the circumstances show an intention of abandonment. *Smith & Powell Co. v. State*, 11 C. C. 87.

Periodical cessations in the continuity of the flooding caused by the erection of a dam, without intention of abandoning the right to flood or where the interruptions were due to the interference of others than the owner of the dam, does not affect the validity in any prescriptive rights acquired by such flooding. *Hall v. State*, 11 C. C. 109.

Easement of air as a property right under the State Constitution. *Sander v. State*, 11 C. C. 1.

Where the State of New York built a canal in the vicinity of the claimant's property years ago but abandoned this canal and constructed a new one, and in the construction of said new canal cut off certain pipes that were laid across the claimant's land from the old canal to the present Erie canal, and by reason of the cutting off of the said pipes the claimant's property was flooded: *Held*, That the State had a right in the construction of the new canal to sever these pipes and that it was not liable

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for any damage that might be done thereby to the claimant's property and that the claim should be dismissed. *McIntyre v. State*, 11 C. C. 25.

Where a permanent easement to flood land has been acquired under the Revised Statutes (§§ 48, 52), Laws 1830, chapter 293, and Laws 1866, chapter 836, any claim for damages resulting from the flooding was not revived by Laws 1870, chapter 321, which applied only to a class of claims which had not been provided for previously. *Ely v. State*, 11 C. C. 65.

Interruption in the continuity of the user of flash boards does not affect the right to an easement acquired under the statutes unless the circumstances show an intention of abandonment. *Ely v. State*, 11 C. C. 65.

See HIGHWAY; PRESCRIPTION; STATUTE OF LIMITATIONS.

ELY, GEORGE BURKE, v. STATE, 11 C. C. 65.

EMERSON, CLARA, v. STATE, 16 C. C. 144

EMINENT DOMAIN. *See* PERMANENT APPROPRIATION.

EMPIRE ENGINEERING CORPORATION v. STATE, 16 C. C. 38

EMPLOYEE. *See* WAGES.

ENABLING STATUTE.

Where the waters of a creek carry down dirt and gravel and form a bar at the mouth of the creek in the bottom of an abandoned canal, and in time of heavy rain the bar so formed causes the waters of this creek to back up and overflow claimant's property: *Held*, That the creek which overflowed being no part of the canal system of the State, without an enabling act the Court of Claims had no jurisdiction of the claim. *Freer v. State*, 11 C. C. 9.

By section 264 of the Code of Civil Procedure the Court of Claims has jurisdiction to hear a private claim against the State, but it is likewise true that the sovereign power cannot be sued without its consent. No such consent is shown or pleaded in this claim. No claim on behalf of a citizen can be maintained against the State for injuries occasioned by the negligence or misfeasance of its agent except when it has by legislative enactment assumed such liability. That no enabling act having been passed by the Legislature conferring jurisdiction upon this court to hear and determine the claim of the claimant, the court has no jurisdiction to hear the same. *Dimmock v. State*, 11 C. C. 23.

Where a canal has been abandoned by the State and damages are occasioned by the use or nonuse which the State makes of the property the claimant must point to some statute wherein the State has consented to assume a liability for its acts. *Hughson v. State*, 11 C. C. 37.

An enabling act which permits the submission of a claim against the State to a court and authorizes an award notwithstanding any "act or omission which might be deemed a bar to such claim" waives the defense that the transaction between the claimant's firm and the State at the time of the firm's settlement of the contract amounted to an agreement whereby they adjusted their claim for extra work and also waives the

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defense that the extra work was not done pursuant to a written order as required by the contract. *LeStrange v. State*, 12 C. C. 249.

Morgan and ano. v. State, 12 C. C. 38.

Quayle v. State, 11 C. C. 44; affirmed in part 124 A. D. 81; 192 N. Y. 47.

See also Munro v. State, 16 C. C. 149

See JURISDICTION; CONSENT.

ENCROACHMENT.

The State may replace an old bridge by a new one of different pattern without liability for damages but in so doing cannot encroach upon private property with its new construction without subjecting itself to liability for damages. *S. F. Hess & Co. v. State*, 11 C. C. 41.

See BRIDGES.

ERIE STREET BRIDGE (BUFFALO).

Where the State is bound to keep and maintain a bridge on Erie street in the city of Buffalo over the Erie canal and permits the steps to become defective and remain so for a year or more, the State is liable to a person who is injured by falling upon the steps leading to said bridge. *Genteluce v. State*, 12 C. C. 234.

The State maintains a bridge over the Erie canal in the city of Buffalo. There were intermittent or slight falls of snow during a few days preceding March 15, 1906. The temperature was such as to permit the thawing of the snow on the ground, during portions of the day, and then freezing and forming ice. At one end of this bridge there were steps about 8 to 10 feet long, 8 to 10 inches wide, and about 8 inches high. The snow fell on these steps, melted, froze, and formed ice about two inches thick, and which was round and smooth. There was another passageway or sidewalk on the opposite side of the bridge on which there was better walking at the time of the accident. On the evening in question the claimant ascended these steps and passed over the bridge. On her return, in descending the same steps, she slipped upon the ice on the second step and fell. *Held*, that the State was not negligent and the claimant could not recover. *Giambrone v. State*, 13 C. C. 212.

See BRIDGES.

EVERSHED MAPS. *See EVIDENCE; MAPS.***EVIDENCE.**

The evidence of damages is to guide and not to control the court in arriving at its award, and where witnesses on the part of the owner testify that certain water power is worth \$34,000 and witnesses on behalf of the State testify that it is worth nothing, the court may make such an award between these estimates as it may deem proper. *Hall v. State*, 11 C. C. 109.

Where a claim is filed to recover damages occurring from the alleged negligence of the State, its officers or servants, in the care and management of the canal, causing a flooding of land, and where there is a conflict of testimony, the claimant is bound to prove by a fair preponderance of evidence that the injury was caused by the negligence of the State. *Parker v. State*, 13 C. C. 17

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When a claimant alleges that his crops were flooded and destroyed by the negligence of the State in carelessly and negligently emptying more water into Black river from the Forestport feeder, and also alleges that the flooding was partly caused by placing flash boards on the State dam at Carthage, the burden is upon the claimant to prove the acts to have been committed by the State. *Van Amber v. State*, 12 C. C. 68.

Where a claim is filed for damages for the appropriation of land, the Court of Claims cannot disregard the evidence and make an award less than the amount testified to by the lowest witness called as to value of the property, and claimant is also entitled to recover an amount paid for a search showing title to the land appropriated. *Burchard v. State*, 15 C. C. 239.

The Holmes-Hutchinson maps of 1834, the Improvement Map of 1838, and the Evershed Maps of 1875, were made pursuant to statute and are competent evidence to prove the State's title to land along Tonawanda creek. *Pierce v. State*, 15 C. C. 260.

Where the title to canal land appropriated prior to the enactment of the Canal Law of 1894 is in dispute, the State may prove its title by showing the actual construction of its canal and works thereon, the Holmes-Hutchinson maps of 1834, the Evershed maps of 1875, official records, maps and documents and any other competent evidence which bears upon the title. *Miller v. State*, 15 C. C. 266.

The original Holmes-Hutchinson maps of 1834 or a duly certified copy of a portion thereof may be offered in evidence upon the subject of the ownership of canal land by the State and are presumptive evidence of the title of the State although copies thereof were not filed in the county clerk's office where the land is situate. *Miller v. State*, 15 C. C. 266.

A map made over 30 years ago for the construction of an improvement of the canal and the appropriation of land necessary therefor produced from a Division Engineer's office of the State may be introduced in evidence as an ancient document bearing upon the possession and title of the State to land included within territory proposed to be appropriated according to the map. *Miller v. State*, 15 C. C. 266.

The so-called Evershed maps of 1875 being over 30 years of age, having been shown to be prepared pursuant to legislative authority and having been produced from the State Engineer's office at Albany, the legal custodian of the maps or a certified copy of a part of such maps are not presumptive evidence of the title to canal lands because not properly authenticated as required by statute, but are competent evidence of the title of the State to the land included within the blue line shown upon the maps. *Miller v. State*, 15 C. C. 266.

Where claimant demands damages alleged to have been caused by leakage from the canal, the burden is on him to show that the water causing the damage came from the canal. Claimant does not establish his cause of action simply by showing that his land is dry when water is out of the canal and wet when water is in the canal. *Pronath v. State*, 16 C. C. 46

In a claim for damages for flooding in 1905, the claimant's evidence was the testimony of witnesses taken in 1903 as to the flooding of the

EVIDENCE — Continued.

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same premises in 1902. The Court held that the burden was upon the claimant to show that the damage was caused through the negligence of the State, and that the claimant could not meet and overcome that burden by evidence of what took place in 1902; conditions might be entirely different in 1905 than in 1902. *Acer v. State*, 16 C. C. 50

EXCAVATION. *See NEGLIGENCE.*

EXCHANGE STREET BRIDGE (ROCHESTER).

The State may replace an old bridge by a new one of different pattern without liability for damages, but in so doing cannot encroach upon private property with its new construction without subjecting itself to liability for damages. Where the State constructs an abutment of a bridge in a public highway beyond the blue line in such a way as to interfere with the light of adjacent property and to ingress and egress and so as to cause dust and other like material to be blown upon claimant's premises, it is liable for the damages occasioned thereby. *S. F. Hess & Co. v. State*, 11 C. C. 41.

Where a bridge tender with the acquiescence of the foreman of repairs aids him in removing old plank from a bridge elevated for purposes of repair and throws a plank upon one lawfully upon the highway, the State is liable although he was a volunteer in assisting in making the repairs. *Spencer v. State*, 11 C. C. 114.

See BRIDGES.

EXECUTIVE LAW. *See STATUTE.*

EXCISE MONEYS. *See STATUTE; TAXES AND ASSESSMENTS.*

EXPERT TESTIMONY.

Claim for compensation under a contract with the State for the giving of. *Hough v. State*, 15 C. C. 146.

Logan v. State, 15 C. C. 161.

See CONTRACT.

EXTRAS. *See CONTRACT; EXTRA HOURS; EXTRA MATERIAL; EXTRA WORK.*

EXTRA HOURS. *See WAGES.*

EXTRA MATERIAL. *See CONTRACT; EXTRA WORK.*

EXTRA WORK.

A subordinate officer of the State has no power or authority to vary or extend a written contract made between the State and a claimant. A local agent, architect, or division engineer is such a subordinate officer and has no power to vary a contract so as to bind the State. Where additional work or better material than the contract requires is ordered by a subordinate officer, compliance of a contractor must be regarded as voluntary service even though the State acquires the benefit by the change. Where one deals with a public officer he is bound to take notice of the scope and limitation of his authority. *Burgard v. State*, 11 C. C. 27.

See also Wright v. State, 16 C. C. 85

See CONTRACT.

FAGAN, JOHN, SR., 12 C. C. 115.

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FARM CROSSINGS.

Where a right of way which a railroad has constructed from the remainder of a farm leads to a parcel that the State has appropriated for Barge canal purposes, and a parcel lying between the railroad and the canal has not been appropriated by the State, the State is not liable for damages because of the isolation of the parcel not appropriated, as the railroad has control of its right of way and it is proper that it should be required to build whatever crossings are necessary upon the completion of its road and such other crossings as may become necessary by a change in ownership or a division of the farm whether brought about by agreement or by condemnation. *Maynard v. State*, 15 C. C. 291.

The Railroad Law provides that railroads are required to construct "farm crossings and openings with gates therein at such farm crossings whenever and wherever reasonably necessary" (section 32), which is a continuing obligation and applies, where, subsequent to the acquisition of its right of way by a railroad, part of a farm is appropriated in condemnation proceedings, which cuts off the only existing farm crossing, regardless of whether the right of way of the railroad was acquired by agreement or by condemnation proceedings, unless it is clear that the railroad company was relieved from the obligation to construct further crossings. *Maynard v. State*, 15 C. C. 291.

FEEDER.

Where the State constructs a feeder utilizing a creek for a portion of the way as a part of the feeder and connects three separate water-sheds, negligently permits gates at the head of the feeder to become out of repair so as to allow water to escape through or under them, and allows the banks of the feeder to become depressed in places and out of repair, it is liable for damages occasioned by flooding, due to its own negligent acts. *Ostrander, J. N., v. State*, 11 C. C. 175.

Ostrander, Charles, v. State, 11 C. C. 72.

Acer v. State, 11 C. C. 72.

Post v. State, 11 C. C. 72.

FITZGERALD, WILLIAM, v. STATE, 12 C. C. 117.

FIXTURES.

Where a lease provides for the erection of structures upon land by a tenant they are to be treated in condemnation proceedings as realty where they form a part of the realty though designated in the lease as personal property removable by the lessee at the expiration or termination of the lease.

Rourk v. State, 15 C. C. 285.

Cole v. State, 15 C. C. 285.

Where the State appropriated land upon which were buildings, erected by tenants under a lease whereby they had the right to remove the buildings at the expiration of the lease, *Held*, That as between the owner and the tenant the buildings are to be regarded as personal property, but as between the State and the parties, they are to be treated as a part of the realty. *Rourk v. State*, 15 C. C. 285.

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Where the State appropriated land upon which there was a factory and an engine and derrick resting upon substantial foundations, all of which were used in connection with the business conducted on the property; *Held*, That the State could not take the bare land and subject the owner to the loss of the depreciation of such structures and machinery as he had placed upon it; that the rule that applied is that which obtains between vendor and vendee, which is that a purchaser of the property would have acquired the engine and derrick with the building as a part of the plant; that there was such an annexation and adaptability of the property as to constitute the engine and derrick a part of the realty; that they were securely attached to the freehold and were used in connection with the business; that they were part of the plant and essential to the operation thereof and could not be removed except with such a depreciation in value as would amount to an appropriation without just compensation. *Phipps v. State*, 15 C. C. 392.

See also DAMAGES.

FLANNIGAN, ALICE, v. STATE, 15 C. C. 263.

FLASH BOARDS.

The State is liable where without authority its officers or employees temporarily maintain flash boards beyond the height to which they were authorized to raise them. *Kline v. State*, 11 C. C. 83.

Where the State arbitrarily maintains during the entire year flash boards which it had been the practice to remove at the close of navigation, it is liable for the injuries occasioned thereby. Where flash boards had been removed usually at the close of each season of navigation and a canal superintendent without special authority maintained the flash boards during the entire year, the State is liable for his acts under the rule that it is liable for the tortious acts of its agents even where they were done in good faith in pursuance of the general authority to act on the subject to which they related. *Cuykendall v. State*, 11 C. C. 143.

Interruption in the continuity of the user of flash boards does not affect the right to an easement acquired under the statutes unless the circumstances show an intention of abandonment. *Ely v. State*, 11 C. C. 65.

Smith & Powell Co. v. State, 11 C. C. 87.

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FLOODING. *See* EASEMENT; LEAKAGE, OVERFLOW AND FLOODING.

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GLENN CREEK (SCHUYLER COUNTY).

Where the waters of a creek carry down dirt and gravel and forms a bar at the mouth of the creek in the bottom of an abandoned canal, and in time of heavy rain the bar so formed causes the waters of this creek to back up and overflow claimant's property: *Held*, that the creek which overflowed being no part of the canal system of the State, without an enabling act the Court of Claims had no jurisdiction of the claim. Freer v. State, 11 C. C. 9.

GOOD ROADS.

Where a statute providing for the construction of good roads contained a provision that the cost of procuring the right of way should be paid by the Comptroller as a part of the cost of the improvement was amended by omitting the latter clause, thus placing the burden upon the county of obtaining the right of way, the amendatory act will not be given a retrospective effect so as to apply to highways in process of construction where condemnation proceedings are pending for the acquisition of the necessary right of way, in view of the Statutory Construction Law which provides that a repeal of a part of a statute should not affect or impair any act done or right accrued or acquired or liability, penalty, forfeiture or punishment incurred prior to the time such repeal took effect but that the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such repeal had not been effected, unless it clearly appears from the amendatory act that the Legislature intended that it should have a retroactive force and should apply to pending improvements and condemnation proceedings. County of Schenectady v. State, 13 C. C. 209.

See CONTRACTS; EXTRA MATERIAL; EXTRA WORK; HIGHWAY; STATUTE.

GOVERNMENTAL FUNCTION.

In operating an inclined railway for the use of which it exacts a fare from passengers, in connection with a reservation like the Niagara Reservation managed by commissioners, the State is not discharging a governmental function and is liable like a private corporation under the same facts. Burks v. State, 13 C. C. 153.

GRANT.

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The general rule for the construction of grants by the State where there is a valuable consideration does not differ from that which applies to grants by individuals, and where the grant is in the nature of a patent of land by the State given for military services there is an adequate consideration and the rule applies. *Fulton Light, Heat and Power Company and ano. v. State*, 12 C. C. 179.

Wood creek, which formed part of the ordinary route of travel between the Hudson river and Lake Champlain from earliest times, and was used by the Indians and later by the Colonists, was regarded as navigable, and in the patent from the English Crown to Philip Skene, was excepted and reserved "as a common highway for the benefit of the public."

Philip Skene having been attainted of treason by the Legislature of the State of New York in 1779, and his lands sold by the Commissioners of Forfeiture, those claiming under the Skene patent have no interest in the bed of Wood creek, and the State may take a portion thereof for its canal system without compensation to the riparian owners.

The State having taken certain adjacent land for canal purposes, the courts may not compel it to take additional lands which may be flooded if the high navigable stage of the canal should ever be reached, and such lands not being necessary for ordinary use and their flooding being only a possibility or contingency, the damage thereto is speculative and not to be considered in fixing the award for the lands taken.

Seemle, for such damages if they should ever occur the owner may have a further claim against the State. *Johnson v. State*, 13 C. C. 55.

Irregardless of the provisions of L. 1835, ch. 232, and L. 1850, ch. 283, the Commissioners of the Land Office have jurisdiction to make grants of land on the Long Island shore to abutting owners thereof, not only to the tideway, that between high and low water mark, but also to the lands under the waters of the river although within the territorial limits of the city and county of New York, out to the bulkhead and pierhead lines established by the Legislature and approved by the War Department. *Palmer v. State*, 15 C. C. 55.

Where the language of certain patents is in substance that in case the grantees named therein shall not within the time specified apply the premises to the purposes of commerce by the adjacent owner "by erecting a dock or docks thereon and filling the same, then these presents and everything therein contained shall cease, determine and become void," *Held*, that said grants being in the present tense thereby give to the grantees the right of immediate title and possession, and that therefore the condition expressed is in law a condition subsequent, subject to forfeiture upon the election of the State in case of noncompliance by the grantee and that, inasmuch as there was no such election until after the conditions were complied with by the present owner of the uplands, no forfeiture can now be adjudged. *Palmer v. State*, 15 C. C. 55.

See also *Davies v. State*, 16 C. C. 115

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HIGHWAY.

The raising, in pursuance of chapter 339 of the Laws of 1893, of the New York & Harlem railroad structure in Park avenue, New York city, which was formerly on or partially below the surface of the street, to an elevated structure, deprived the abutting owner of property right in his easements of light and air, and entitled him to compensation of which he could not be deprived either because the structure was erected under a State statute requiring it or because access to his property was increased by the raising of the structure. *Sander v. State*, 11 C. C. 1.

The premises of the claimant are situated on the corner of Broad street and Seventh street in the village of Waterford. The State, pursuant to chapter 147 of the Laws of 1903, known as the Barge Canal Act, constructed a canal across Seventh street some distance from the premises of the claimant. Claimant insists that he is entitled to compensation on account of his property being less accessible and that the construction of the canal across Seventh street constituted a taking of property within the Constitution. *Held*, that the claimant could not recover. *Vogel v. State*, 11 C. C. 151.

The cutting off of a farm from access to a public highway by means of an appropriation of a part of the farm is an element to be taken into account in determining the compensation to which the claimant is entitled and in estimating this element of damage the expense of procuring a new right of way and the distance to the new highway may be considered. *Flannigan v. State*, 15 C. C. 263.

Where the State appropriated land for the Barge canal and thereby cut off the claimants' access to the public highways, *Held*, that the

HIGHWAY — Continued.	Page.
value of the land taken did not represent the damages which the claimants had sustained, for they were entitled to the damage that the remainder of the farm may have sustained as a result of the deprivation of the farm from access to the public highway. <i>Guerin v. State</i> , 15 C. C. 279.	
Where the State, for Barge canal purposes, appropriates land constituting part of a farm, which appropriation divides the farm into two parts one part of which is cut off from access to the highway and has no outlet, the claimant is entitled to the market value of the land taken, including whatever in the nature of realty was attached to the land, and is also entitled to a substantial allowance for damages to the property cut off from access to the highway. <i>Perkins v. State</i> , 15 C. C. 282.	
For damages awarded to Barge canal contractor for maintaining highway traffic, see <i>I. M. Ludington Sons, Inc.</i> , 16 C. C.	173
In constructing a State highway along claimant's land, the contractor took stone fences on the land and used the stone in the construction of the road. Stumps, stones, gravel and debris were thrown from the highway by the contractor on to the lands of the claimant, causing substantial damage to the claimant. The State had not appropriated the stone fences nor the land upon which this material was thrown, nor had it designated said stone fences for construction purposes or said land for spoil purposes. The Court held that the acts of the contractor were without the purview of his contract with the State but were his individual acts done for his own convenience and upon his own authority; and that for such acts the contractor and not the State was liable.	
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<i>Ash v. State</i> , 16 C. C.	52
<i>Kelley v. State</i> , 16 C. C.	52
The specifications in a highway contract required that the ingredients of the concrete should be approved by the Bureau of Tests of the State Highway Department before being used on the work. As to one gravel pit, the division engineer took a sample, subjected it to a field test and gave the contractor written approval for its use, but neglected to forward the sample to the Bureau of Tests until after the contract was canceled. It was then forwarded, however, and approved. As to the other pit, a sample had been forwarded to the Bureau of Tests for use in the construction of a nearby highway and the division engineer knew it had been approved at the time he gave the contractor herein his consent for its use. The Referee held that the failure of the division engineer to forward the sample of gravel taken from the first pit to the Bureau of Tests was the act of the official of the State for which the contractor was not responsible, and in view of the fact that the Bureau of Tests had subsequently approved the material it was apparent that the State had not been prejudiced by such failure. <i>Peter F. Connolly Co. v. State</i> , 16 C. C.	216
The "information for bidders" in connection with a contract for the construction and improvement of a State highway, contained a provision that where the use of local sand and gravel is anticipated the proposal	

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sheets will give the information as to the location of such material, and further provided that "when such information is not given in the proposals the contractor will be required to furnish approved imported material." The proposal sheets gave no information as to the location of material that could be used, and consequently the duty devolved upon the contractor to furnish "approved imported material."

Expert witnesses were of the opinion that the material was "local" material if it could be reached by the contractor's outfit that was maintained for the purpose of constructing the highway under the contract; and that it was "imported" material if it was such as could be brought in by a common carrier. The Referee, however, refused to adopt this construction, but limited "local" material "to that which is adjacent to the highway," and "imported" material to "material brought in from a place other than where it is to be used, by whatever means, public or private." *Peter F. Connolly Co. v. State*, 16 C. C. 216

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HOUGH, DAVID L., v. STATE, 15 C. C. 146.

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HYNES, JOHN P., v. STATE, 13 C. C. 49.

I. M. LUDINGTON SONS, INC., v STATE, 16 C. C. 175

IMPROVEMENT OF NAVIGATION.

Where in the construction of a canal the State utilizes one of the inland rivers so far as practicable, and at points where it is impracticable to use the river on account of the fall in the stream constructs the canal around such portion, the canal at such portion is not to be deemed as improvement of the navigation of the river so as to exempt the State from liability for consequential damages arising from its work of improvement. *Fulton Light, Heat and Power Co. v. State*, 13 C. C. 285.

IMPROVEMENT MAP OF 1838. *See EVIDENCE; MAPS.*

INCLINED RAILWAY (NIAGARA RESERVATION).

Where the State owns a reservation like that at Niagara Falls and for its management has created a board whose duty it is to "manage" and "control" the property and pay into the treasury all "rents, issues

INCLINED RAILWAY (NIAGARA RESERVATION) — Continued. Page.

and profits" thereof, inviting the public to use the reservation and an inclined railway operated in connection therewith, it is bound to use reasonable care to see that persons using the railway are not injured and for the absence of such care and for its negligence, where there is no contributory negligence on the part of the claimant, the State is liable. *Burks v. State*, 13 C. C. 153.

Inda v. State, 13 C. C. 153.

Olszewska v. State, 13 C. C. 153.

Where it appears that in the operation of an inclined railway a rope was used instead of a steel cable which was more suitable and more generally used, that the rope had a smaller number of strands than those of the two preceding years and had become worn in places so that it had become necessary to some extent to wrap the rope in places with burlap, that the break occurred in the rope at one of these points, that the safety device was not sufficient to serve its purposes, was not constructed of proper material or of sufficient strength, that the inspection of the railway was superficial and insufficient, there is abundant proof of the State's negligence. *Burks v. State*, 13 C. C. 153.

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See NIAGARA RESERVATION.

INCUMBRANCE. *See PERMANENT APPROPRIATION.*

INDA, ROSALIA, exec., etc., v. STATE, 13 C. C. 153.

INDEPENDENT CONTRACTOR.

In constructing a State highway along claimant's land, the contractor took stone fences on the land and used the stone in the construction of the road. Stumps, stones, gravel and debris were thrown from the highway by the contractor on to the lands of the claimant, causing substantial damage to the claimant. The State had not appropriated the stone fences nor the land upon which this material was thrown, nor had it designated said stone fences for construction purposes or said land for spoil purposes. The Court held that the acts of the contractor were without the purview of his contract with the State but were his individual acts done for his own convenience and upon his own authority: and that for such acts the contractor and not the State was liable.

Franks v. State, 16 C. C. 52

Ash v. State, 16 C. C. 52

Kelley v. State, 16 C. C. 52

See CONTRACT; DAMAGES; GOOD ROADS; NEGLIGENCE.

Where claimant's property is flooded by the construction of a cofferdam by a contractor, the flooding resulting from the manner in which the contractor did his work and not arising necessarily out of the contract itself, the contractor and not the State is liable, his relation being that of an independent contractor. *Hunt v. State*, 15 C. C. 145.

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INTENTION. See NOTICE OF INTENTION.

INTEREST.

Interest earned by the State upon a deposit is recoverable in a claim for breach of contract to the date of final accounting if made within reasonable time with legal interest thereafter; also legal interest on the unearned profits from the date of the final account if made within a reasonable time after the breach of the contract. *Baker v. State*, 12 C. C. 3.

See CONTRACT; DAMAGE; HIGHWAY; STATUTE; TAXES AND ASSESSMENTS.

INTERLAKEN-TRUMANSBURG HIGHWAY.

<i>Murray v. State</i> , 16 C. C.	63
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JOHNSON, JANE B., v. STATE, 13 C. C. 55.

JOY, LEON S., v. STATE, 12 C. C. 238.

JUCKETT, BYRON D., v. STATE, 13 C. C. 88.

JUDGE OF COURT OF APPEALS.

Earl v. State, 13 C. C. 33.

JURISDICTION.

Where the waters of a creek carry down dirt and gravel and form a bar at the mouth of the creek in the bottom of an abandoned canal, and in time of heavy rain the bar so formed causes the waters of this creek to back up and overflow claimant's property: *Held*, that the creek which overflowed being no part of the canal system of the State, without an enabling act the Court of Claims had no jurisdiction of the claim. *Freer v. State*, 11 C. C. 9.

By section 264 of the Code of Civil Procedure the Court of Claims has jurisdiction to hear a private claim against the State, but it is likewise true that the sovereign power cannot be sued without its consent. No such consent is shown or pleaded in this claim. No claim on behalf of a citizen can be maintained against the State for injuries occasioned by the negligence or malfeasance of its agent except when it has by legislative enactment assumed such liability. That no enabling act having been passed by the Legislature conferring jurisdiction upon this court to hear and determine the claim of the claimant, the court has no jurisdiction to hear the same. *Dimmock v. State*, 11 C. C. 23.

A claim against the State cannot be barred by lapse of time so long as there was no tribunal in existence with authority to adjudicate upon it. The State could not be sued unless it created a tribunal to hear and determine such claim as the one at bar. By chapter 163 of Laws of 1904, passed March 28, 1904, the Legislature conferred upon the Court of Claims jurisdiction to hear, audit, and determine such claims and render judgment thereon notwithstanding the lapse of time since the accruing of said claim, provided any claim thereunder shall be filed with the

JURISDICTION — Continued.

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Court of Claims within six months after the passage of the act. This claim was filed September 28, 1904. The Statute of Limitations has no application here and the claimant is entitled to recover. *County of Monroe v. State*, 11 C. C. 34.

Where a canal has been abandoned by the State and damages are occasioned by the use or nonuse which the State makes of the property, the claimant must point to some statute wherein the State has consented to assume a liability for its acts. *Hughson v. State*, 11 C. C. 37.

The consent of the State to have its liability determined must be obtained before it can be sued. *Quayle v. State*, 11 C. C. 44.

In order to authorize the consideration of a claim upon its merits by the Court of Claims it must appear not only that the court has had jurisdiction conferred upon it but that the State has consented to have its liability determined. *Quayle v. State*, 11 C. C. 44.

The claim for the balance due under the contract for work done by the claimant's assignor, part of which was rejected by the Comptroller, was brought within the jurisdiction of the court by the mandatory act of 1908 (chap. 519) which provided that "The court has no jurisdiction of a claim submitted by law to any tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim or some part thereof has been rejected by such tribunal or officer." *National Commercial Bank of Albany v. State*, 13 C. C. 239.

Under the statutes conferring jurisdiction upon the Court of Claims over "private" claims against the State and granting consent on the part of the State to have its liability determined, a resident of another State may maintain a claim against the State for negligence in the maintenance and operation of an inclined railway through which he was injured. *Burks v. State*, 13 C. C. 153.

Where a statute conferring jurisdiction upon the Court of Claims provides that the court "has jurisdiction to hear and determine a private claim against the State" but that "the court has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim or some part thereof has been rejected by such tribunal or officer," (§ 264 of the Code of Civil Procedure) the language does not cover a claim like that of an erroneous or illegal state tax or assessment and does not authorize a submission of such a claim to this court. *Flower v. State*, 15 C. C. 164.

Where the owner of land appropriated by the State has made a settlement with the State through the State appraiser as to the compensation to be paid him which has however not been paid, and one claiming to have been the lessee of the premises at the time of the appropriation files a claim to have the amount of his damages determined, his remedy is against the fund created by the settlement and not against the State. *Moroney v. State*, 15 C. C. 231.

The Court of Claims has no jurisdiction to determine a dispute as to the validity of a lease or the amount of the damages to a tenant where the owner of the land appropriated has made a settlement with the State through the State appraiser and has not been paid and has not been made a party to the proceeding and has not consented to have the

JURISDICTION — Continued.

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issues between him and his tenant passed upon by the court. Where, however, in such a case the owner is made a party to the proceeding brought by the tenant and consents to have the issues between him and his tenant determined, the court has jurisdiction to pass upon the issues involved between them. *Moroney v. State*, 15 C. C. 231.

Where the State appropriated land upon which were buildings, erected by tenants under a lease whereby they had the right to remove the buildings at the expiration of the lease, *Held*, that the awards are made upon the express consent of the parties that the Court of Claims might determine the interests of each. *Rourk v. State*, 15 C. C. 285.

Cole v. State, 15 C. C. 285.

The Court of Claims is without jurisdiction to apportion the share of an award to the owner which should be paid to each of the tenants where the owner objects to the determination thereof by this court. Claimants' remedy lies before the Comptroller of the State, and if a dispute arises about the value of claimants' leasehold interest, it must be determined in the Supreme Court. *Taylor v. State*, 15 C. C. 305.

Fowler v. State, 15 C. C. 305.

The Legislature has no power to create a court wherein suitors are compelled to try issues without consent which they have a constitutional right to try in the regular courts and there is nothing in the act creating the Court of Claims which indicates an intention on the part of the Legislature to compel suitors to try issues between them in that court. *Taylor v. State*, 15 C. C. 305.

While jurisdiction cannot be created by the consent of parties where the Constitution or the Legislature has not conferred it, it may be waived where it exists, and where the Constitution confers upon certain courts jurisdiction to try certain issues and the Legislature confers upon the Court of Claims jurisdiction to pass upon the same issues where they are involved in a claim made against the State, the parties may waive their constitutional right to have the issues determined in the regular courts and submit themselves to the jurisdiction of the Court of Claims. *Taylor v. State*, 15 C. C. 305.

The statutes relating to the Court of Claims and the Barge Canal Act (L. 1903, ch. 147, § 4, as amended by L. 1908, ch. 196), taken together may be fairly construed to mean that the Legislature intended that where all the parties did not consent to have their respective interests the State appropriated, determined by the Court of Claims, a gross award should be made for the aggregate interests and then the parties should be remanded to the regular constitutional courts for a distribution between them of their respective interests. *Taylor v. State*, 15 C. C. 305.

Claimant failed to file notice of intention, which is required by Section 264 of the Code of Civil Procedure in claims other than for the appropriation of land, and contended that no such notice was required because the alleged damage was due to the permanent improvement made by the State in constructing a dam which interfered with the free flow of water in the creek and caused the flooding.

The Court held that the service of the notice of intention is jurisdictional and cannot be waived. The jurisdiction of the Court of Claims to hear any claim rests upon statute and in this instance the statute says

JURISDICTION — Continued. Page.

that no claim shall be "maintained" against the State unless such a notice has been filed. This language goes to the very right of the claimant to maintain the action, and unless the notice is filed the Court has no jurisdiction to entertain the claim, irrespective of any question as to whether or not the attention of the Court was called to the failure to file it.

Jurisdiction cannot be conferred by the mere omission of the Attorney-General's office to make the objection on the trial. It is the duty of the claimant to show on the trial that everything necessary to confer jurisdiction has been done. In this case, before a decision had been made, the Court's attention was called directly to the fact that no notice of intention had been filed. The Court having actual knowledge that an act necessary to confer jurisdiction had been omitted, cannot go into the merits, but must dismiss the claim. *Butterfield v. State*, 16 C. C. 24

Butterfield v. State, 16 C. C. (Court of Appeals) 308

The claimant rendered certain legal services and incurred certain expenses in investigation and in preparation for the trials of certain actions growing out of the Great Meadow prison investigation. The claimant contended that he was orally designated on August 6, 1913, by former Governor William Sulzer, under and by virtue of section 8 of the Executive Law.

The right of the claimant to recover was challenged by the State on various grounds, but the Court did not find it necessary to pass upon these objections because it reached the conclusion that it had no jurisdiction to entertain the claim. One of the limitations upon the jurisdiction of the Court is, that it shall not extend to any claim submitted by law to any other tribunal or officer for audit or determination, except where the claim is founded upon express contract and has been in whole or in part rejected by such tribunal or officer. (See section 264 of the Code of Civil Procedure.)

Under section 8 of the Executive Law, in order to obtain his compensation and expenses, claimant was required to obtain from the Governor an order and from the Comptroller a warrant before the Treasurer was authorized to pay him. Upon the refusal of any of these officers to observe the statute he had a remedy to mandamus to compel performance, and it was only upon their rejection of the claim in whole or in part that he could have recourse to the Court of Claims. The claim had never been rejected by any officer of the State, and the Court of Claims had therefore no jurisdiction to pass upon the same. *Whedon v. State*, 16 C. C. 33

JURISDICTION OF COURT OF CLAIMS ENLARGED.

Code of Civil Procedure, sec. 264, as amended by L. 1908, ch. 519.
See CONSENT; STATUTES; TAXES AND ASSESSMENT.

KEITH, GEORGE, v. STATE, 12 C. C. 144.

KEITH, LEWIS, v. STATE, 12 C. C. 144.

KELLEY, ELBRIDGE, v. STATE, 16 C. C. 52

KENNEDY, JOSEPH P., v. STATE, 12 C. C. 144.	Page.
KILTS, GEORGE C., v. STATE, 16 C. C.	129
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KINZER CONSTRUCTION COMPANY v. STATE, 15 C. C. 326.	
KIRBY, GUSTAVUS T., v. STATE, 15 C. C. 246.	
KLEINMEIER, CHARLES F., v. STATE, 16 C. C.	105
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KLINE, JAY B., v. STATE, 11 C. C. 83.	
KLINE, JAY B., v. STATE, 15 C. C. 366.	
KNIGHT, WILLIS G., v. STATE, 16 C. C.	66
KONNER, VICTORIA, v. STATE, 16 C. C.	92
16 C. C. (Appellate Division)	320
KUHN, HENRY, ET AL., v. STATE, 12 C. C. 246.	

LABOR. *See* CONTRACT; DAMAGE; HIGHWAY.

LANDLORD AND TENANT.

Where a tenant is in possession of land, and continues in possession without written notice of an appropriation and by agreement with proper State officials, sows his crops and is prevented from harvesting them by a notice to vacate, he is entitled to recover the value of such crops. *Lynch v. State, 12 C. C. 36.*

The State appropriated for the purposes of the new Barge canal the property of D. Before the appropriation D had leased the property to the claimant, B, which lease was duly recorded in the county clerk's office of the county where the property was situated. The lease had five years to run at the time of the appropriation. B, the lessee and claimant, was in the possession and occupancy of the property when it was appropriated. After the appropriation the State made a settlement with D, the owner and lessor, paying him an agreed sum for the property. B, the lessee, in possession and occupancy under the recorded lease was not settled with. *Held*, that any settlement under such conditions, with the owner, D, by the State, could not affect the rights of the claimants, and that they were entitled to recover the value of their lease at the time of the appropriation. *Baker and ano. v. State, 13 C. C. 22.*

Where a lease provides for the erection of structures upon land by a tenant they are to be treated in condemnation proceedings as realty where they form a part of the realty though designated in the lease as personal property removable by the lessee at the expiration or termination of the lease.

Rourk v. State, 15 C. C. 285.

Cole v. State, 15 C. C. 285.

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Where the owner of land appropriated by the State has made a settlement with the State through the State appraiser as to the compensation to be paid him which has however not been paid, and one claiming to have been the lessee of the premises at the time of the appropriation files a claim to have the amount of his damages determined, his remedy is against the fund created by the settlement and not against the State. *Moroney v. State*, 15 C. C. 231.

The Court of Claims has no jurisdiction to determine a dispute as to the validity of a lease or the amount of the damages to a tenant where the owner of the land appropriated has made a settlement with the State through the State appraiser and has not been paid and has not been made a party to the proceeding and has not consented to have the issues between him and his tenant passed upon by the court. Where, however, in such a case the owner is made a party to the proceeding brought by the tenant and consents to have the issues between him and his tenant determined, the court has jurisdiction to pass upon the issues involved between them. *Moroney v. State*, 15 C. C. 231.

Where the owner of property and his tenant's assignee appeared in court and consented that their respective claims against the State and each other be determined. *Held*, that the owner was entitled to the value of the premises less the value of the lease, and the lessee's assignee was entitled to the value of the leasehold, which as no witnesses were produced by the State, was estimated to be the difference between the rental value, as testified by the claimants' witnesses, for the unexpired term over and above the rent reserved, deducting the water tax which the lessee was obliged to pay. *Riley v. State*, 15 C. C. 277.

Osley v. State, 15 C. C. 277.

Where the State appropriated land upon which were buildings, erected by tenants under a lease whereby they had the right to remove the buildings at the expiration of the lease, *Held*, that the interest of the tenants is the market value of their lease, taking into account all of its items, including the buildings and any other property in the nature of realty they had attached to the soil. The award to the owner is for the value of the fee, which includes structures in the nature of realty attached to the soil. The compensation awarded for the fee must include an amount sufficient to compensate the tenants for the value of their lease including the buildings and other property in the nature of realty they had placed upon the land. The difference between the market value of the fee and the market value of the lease, taking all the elements into account will measure the compensation of the owner. The balance will be the compensation to which the tenants are entitled.

Rourk v. State, 15 C. C. 285.

Cole v. State, 15 C. C. 285.

Where the State appropriated land upon which were buildings, erected by tenants under a lease whereby they had the right to remove the buildings at the expiration of the lease: *Held*, that as between the owner and the tenant the buildings are to be regarded as personal property, but as between the State and the parties, they are to be treated as a part of the realty. *Rourk v. State*, 15 C. C. 285.

LANDLORD AND TENANT — Continued. **Page.**

Where the State appropriated land upon which were buildings, erected by tenants under a lease whereby they had the right to remove the buildings at the expiration of the lease, *Held*, that the awards are made upon the express consent of the parties that the Court of Claims might determine the interests of each. *Rourk v. State*, 15 C. C. 285.

Cole v. State, 15 C. C. 285.

The Court of Claims is without jurisdiction to apportion the share of an award to the owner which should be paid to each of the tenants where the owner objects to the determination thereof by this court. Claimants' remedy lies before the Comptroller of the State, and if a dispute arises about the value of claimants' leasehold interest, it must be determined in the Supreme Court. *Taylor v. State*, 15 C. C. 305.

Fowler v. State, 15 C. C. 305.

McFadden v. State, 15 C. C. 305.

Where the State appropriates a block, part of which is occupied by tenants in possession under a written lease, the total amount of damages for which the State is liable is the market value of the premises, out of which must come the leasehold interest. *Taylor v. State*, 15 C. C. 305.

McFadden v. State, 15 C. C. 305.

Fowler v. State, 15 C. C. 305.

LAND OFFICE, COMMISSIONERS OF. *See* GRANT.

LANE BROTHERS CO. v. STATE, 16 C. C. 238

LANG, MARY L., v. STATE, 13 C. C. 3.

LASHER, HENRY M., v. STATE, 11 C. C. 128.

LATTIN'S GUARD GATE.

I. M. Ludington Sons, Inc., v. State, 16 C. C. 175

LEAKAGE, OVERFLOW AND FLOODING.

Where the State of New York built a canal in the vicinity of the claimant's property years ago but abandoned this canal and constructed a new one, and in the construction of said new canal cut off certain pipes that were laid across the claimant's land from the old canal to the present Erie canal, and by reason of the cutting off of the said pipes the claimant's property was flooded: *Held*, that the State had a right in the construction of the new canal to sever these pipes and that it was not liable for any damage that might be done thereby to the claimant's property and that the claim should be dismissed. *McIntyre v. State*, 11 C. C. 25.

Freer v. State, 11 C. C. 9.

Where a permanent easement to flood land has been acquired under the Revised Statutes (§§ 48, 52), Laws 1830, chapter 293, and Laws 1866, chapter 836, any claim for damages resulting from the flooding was not revived by Laws 1870, chapter 321, which applied only to a class of claims which had not been provided for previously. *Ely v. State*, 11 C. C. 65; *Smith & Powell Co. v. State*, 11 C. C. 87.

LEAKAGE, OVERFLOW AND FLOODING — Continued.**Page.**

The State must respond in damages where it negligently turns water upon the land of another which water without the intervention of the State would not find its way there naturally and thereby causes damage, but where the State turns water upon the land of another, which land was flooded and damaged previously from natural causes, the State is not liable where all of the damages were occasioned before the State's trespass, even though without legal right it mingles the surplus water from the canal with the flood water. If the State negligently turns water from a feeder upon the land of another where it mingles with flood waters from a creek and the combined waters cause damages the State is not liable for all of the damages occasioned but only for such portion as it actually causes. *Ostrander v. State*, 11 C. C. 175.

Ostrander, Charles, v. State, 11 C. C. 72.

Acer v. State, 11 C. C. 72.

Post v. State, 11 C. C. 72.

Where the State constructs a feeder utilizing a creek for a portion of the way as a part of the feeder and connects three separate watersheds, negligently permits gates at the head of the feeder to become out of repair so as to allow water to escape through or under them, and allows the banks of the feeder to become depressed in places and out of repair, it is liable for damages occasioned by flooding due to its negligent acts. *Ostrander, J. N., v. State*, 11 C. C. 175.

Ostrander, Charles, v. State, 11 C. C. 72.

Acer v. State, 11 C. C. 72.

Post v. State, 11 C. C. 72.

Where the State without legal right turns water upon the land of another causing all the damages and subsequently other water from natural sources mingles with those of the State, the State must respond for all of the damages as the sole source of damage. Where all the damage to land occurs from natural causes resulting from the overflow of a creek the State is not liable for any damages though without legal right it mingles with the flood surplus water from the canal. Where part of the damages resulting from flooding are occasioned by water which the State without legal right turns upon the land of another and part are due to the natural overflow of a creek, the State is liable only for such portion of the damages as it actually occasions.

Carhart v. State, 11 C. C. 128.

Lasher v. State, 11 C. C. 128.

Cook v. State, 11 C. C. 128.

Negligence in discharging surplus water of canal into creek and flooding land thereby, see *Carhart v. State*, 11 C. C. 128.

Lasher v. State, 11 C. C. 128.

Cook v. State, 11 C. C. 128.

When in 1880 the State constructed a dam at the foot of Sixth lake and the owners of land flooded filed a claim against the State, and an award was made against the State for the flooding of all lands that would be flooded by a dam at the foot of said lake with a flow line ten and one-half feet above the apron of the dam and the State paid the award: *Held*,

LEAKAGE, OVERFLOW AND FLOODING — Continued.**Page.**

that the State had acquired the right to maintain a dam, the flow line of which should not exceed ten and one-half feet above the apron of the dam, and that in case of floods raising the general surface of the lake to a higher level, the State was not liable. *Rowe v. State*, 11 C. C. 165.

The State is liable for the damages occasioned by the escape of water from the canal through the negligent maintenance of the walls of the canal, even though the damages arise in the course of the excavation of private property near the canal for the purpose of building and even though a part of the excavation is on land filled in which formerly formed a part of a canal basin. *Duffy v. State*, 11 C. C. 182.

Where the State negligently allows water to escape through the banks of the canal so as to injure adjacent property it is liable for the damages occasioned. *Duffy v. State*, 11 C. C. 182.

Where the State negligently allows its canal banks to leak and thus injures crops, it is liable for the damages caused thereby. *Fagan v. State*, 12 C. C. 115.

Where the basis of the claim is negligently operating canal gates so that the claimant's land was flooded, the claimant cannot recover unless he establishes a want of that care of action which the state owed to him. *Harris v. State*, 12 C. C. 22.

Where the State negligently turns water from a canal into a creek and thus floods private land adjacent to the creek, it is liable for the damages caused by it where they would not have occurred but for the intervention of the State. *Harris v. State*, 12 C. C. 33.

Where damages are claimed for negligent flooding of land by the State arising from original construction of the canal due to interference of natural drainage for which compensation was or is presumed by lapse of time to have been made, they must be separated from the damage due to the negligent construction or maintenance of the canal resulting in a continuous trespass. *Keith v. State*, 12 C. C. 144.

Where the State utilizes a creek as a part of its canal system and in leaving the creek discharges in a negligent manner surplus water of the canal into the continuing channel of the creek, it is liable for the damages occasioned thereby to property bordering upon such channel. *Juckett v. State*, 13 C. C. 88.

Where a claim is filed to recover damages occurring from the alleged negligence of the State, its officers or servants, in the care and management of the canal, and where there is a conflict of testimony, the claimant is bound to prove by a fair preponderance of evidence that the injury was caused by the negligence of the State. *Parker v. State*, 13 C. C. 17.

Negligence on the part of the State in the alleged flooding of land bordering upon a canal will not be inferred from the bare fact that before certain improvements were made on the canal the land was dry and that after the improvements the land was wet, it being necessary to show that the water which it is claimed caused the damage came from the canal and was due to the State's negligence. *Perkins v. State*, 13 C. C. 96.

LEAKAGE, OVERFLOW AND FLOODING — Continued.**Page.**

Where the State negligently maintains the banks of its canal so as to allow them to leak and discharge water upon adjacent property, it is liable for the damages occasioned thereby. *Riggs v. State*, 13 C. C. 110.

Where premises in a somewhat deteriorated condition are flooded through the negligent acts of the State causing damages to the structures and a loss of rents, the owner of the premises is entitled to the cost of making reasonable repairs to put his premises in a tenantable condition and to the loss of rents occasioned by the negligent acts of the State. In such a case the owner is not entitled to the diminution in the market value of the premises in addition to the cost of making repairs and the loss of rents. *Stevens v. State*, 13 C. C. 111.

Where claimant's property is flooded by the construction of a cofferdam by a contractor, the flooding resulting from the manner in which the contractor did his work and not arising necessarily out of the contract itself, the contractor and not the State is liable, his relation being that of an independent contractor and the rule being well settled that there is no liability on the part of the State for acts similar to those referred to where it enters into a contract with a competent contractor, doing an independent business, who agrees to furnish materials and labor and make the entire improvement according to specifications prepared in advance for a lump sum or its equivalent, even when it reserves the right to change, inspect and supervise to the extent necessary to produce the result intended by the contract, providing the plant is reasonably safe, the work is lawful and is not a nuisance when completed and there is no interference therewith by State officers which results in injury. *Hunt v. State*, 15 C. C. 145.

The State is liable only for damages caused by its own negligent acts, or to put the statement in another form, where damages are claimed for leakage from the canal, it is not liable if the damages claimed to have been suffered by leakage would have occurred notwithstanding its negligence. *Cowles v. State*, 15 C. C. 287.

Where the proof clearly shows that the State was negligent in the care of the canal bank and that water came through the break and actually invaded the trenches and works of the claimant, a contractor engaged in building a sewer, and caused him considerable damage, the claimant should be allowed the damages which he has proven were caused thereby. *Cowles v. State*, 15 C. C. 287.

In a claim for damage from leakage, where it appeared that former recoveries had been had for the same alleged negligence on the part of the State, and the Court was satisfied that the claimant had not exerted himself to avoid the recurrence of damages, and where the testimony was of a somewhat general nature and claimant's books, which he asserted showed his losses in rent, were not in court, and no tenant was sworn to show he had moved out of claimant's premises because of their wet condition, and as only a slight expense was required to obviate any further damage, *Held*, That an award for a small sum was sufficient to cover all the damages for which the State should respond, and it was the duty of the claimant to use all reasonable measures to reduce his damages as much as possible. *Stevens v. State*, 15 C. C. 301.

LEAKAGE, OVERFLOW AND FLOODING — Continued. Page.

Where it appears that a culvert for carrying away waters of a stream in times of flood was not improperly constructed, and that it was of sufficient capacity to take care of all ordinary rains and such as naturally would be expected in the locality, the State is not liable for damages resulting from the failure of the culvert to carry off the water resulting from the fall of rain during an unusual storm. *New England Brick Co. v. State*, 15 C. C. 313.

Where it appears that a culvert for carrying off the waters of a stream in times of flood has been kept free and clear of obstructions by the State, and it further appears that the claimant has been in the habit of dumping refuse wood and brick on the banks of the creek, a portion of which during an unusual storm washed down stream against the culvert, the State cannot be held liable for damages resulting to the claimant from flooding of the claimant's premises, due to the choking of the culvert by the washing down of the material against it. *New England Brick Co. v. State*, 15 C. C. 313.

The word "appropriation" has a varying meaning but it cannot be interpreted to include a case of temporary or occasional flooding arising from an improvement constructed on a stream below the point of flooding. The exception of cases where the State has made an appropriation of land is due to the fact that the appropriation is the act of the State itself; it has full knowledge of the facts, and therefore no notice of intention is necessary. *Butterfield v. State*, 16 C. C. 24

Claimants ask to recover damages for the loss of the use of about thirty acres of agricultural land, the contention being that this land was made too wet for cultivation and pasturage by reason of water from the Erie Canal seeping from said canal and flowing down said lands and covering them with water. *Held*, that the evidence failed to show that the damage claimed during the year 1912 was caused by seepage. *Ryder v. State*, 16 C. C. 30

The Court held that negligence on the part of the State will not be inferred from the bare fact that before certain improvements were made on the canal the land was dry, and that after the improvements the land was wet, it being necessary to show that the water which it is claimed caused the damage came from the canal and was due to the State's negligence.

Claimant also contended that at some prior time the State opened up ditches across this land to carry off seepage from the canal. The Court held that if such seepage no longer existed there was no obligation upon the State to maintain the ditches. *Winn v. State*, 16 C. C. 31

Where claimant demands damages alleged to have been caused by leakage from the canal, the burden is on him to show that the water causing the damage came from the canal. Claimant does not establish his cause of action simply by showing that his land is dry when water is out of the canal and wet when water is in the canal. *Pronath v. State*, 16 C. C. 46

In a claim for damages for flooding in 1905, the claimant's evidence was the testimony of witnesses taken in 1903 as to the flooding of the

LEAKAGE, OVERFLOW AND FLOODING — Continued. Page.
 same premises in 1902. The Court held that the burden was upon the claimant to show that the damage was caused through the negligence of the State, and that the claimant could not meet and overcome that burden by evidence of what took place in 1902; conditions might be entirely different in 1905 than in 1902. It was also held that if the rainfall in the natural watershed of the creek which was alleged to have overflowed was sufficient to cause the creek to overflow its banks and flood claimant's farm, irrespective of any other cause, then it is immaterial what the State did. *Acer v. State*, 16 C. C. 50

The State, under certain legislative acts, erected a dyke on the south side of the Chemung river in the city of Corning along a portion of claimant's farm. During the periods of heavy spring and fall floods the water had previously overflowed the south bank, but the dyke since its erection had confined the water to the river channel thus causing it to run more swiftly. This condition piled up a gravel island or bar below the end of the dyke and caused a gradual change of current in the river. The bank on the north side of the river being high, the water crowded towards the south bank and slowly cut away the low slope, later the normal bank and finally the tillable land beyond. The portion of the farm beyond the end of the dyke, about thirty-five acres in extent, was subjected to considerable current when the water was high, which current washed away the top soil. Because of this condition this part of the farm several years ago was turned into a meadow and finally into a pasture.

The cutting of the high bank commenced in 1901 but the notice of intention to file the claim was not filed until March 15, 1912. The Court held that the State had, by the faulty design and construction of the dyke, interfered with the natural channel and flow of the river, that the State may or may not have owed a duty to build a dyke, but, having built it, the State must assume any damages arising from the failure to build it properly, but that inasmuch as the notice of intention was not filed until March 15, 1912, the claimant could recover only those damages which had occurred from September 15, 1911.

It was held that the measure of damage to claimant because of the cutting off of her land by the river was the depreciation in the fair market value of her farm between September 15, 1911, and the date of the trial; that in addition the claimant was entitled to the annual rental value of the said thirty-five acre piece less the rental value for the purposes for which it could now reasonably be used in the course of good husbandry, being subject to such a current.

The balance of claimant's farm was flooded by back water, but the Court found that this back water condition was present before the dyke was constructed and no award was made for any damage for such back water flooding. *Park v. State*, 16 C. C. 132

See NEGLIGENCE.

See BUTTERNUT CREEK; CHITTENANGO CREEK; GLENN CREEK; LIMESTONE CREEK; OAK ORCHARD CREEK; OAK ORCHARD FEEDER; TONAWANDA CREEK; WHITNEY CREEK.

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Construction of, where tenants had right to remove buildings at expiration of. *See* Rourk v. State, 15 C. C. 285.

Cole v. State, 15 C. C. 285.

See LANDLORD AND TENANT.

LEHIGH VALLEY RAILWAY COMPANY v. STATE, 15 C. C. 226.

LENOX, TOWN OF, v. STATE, 12 C. C. 159.

LE STRANGE, FREDERICK, ETC., v. STATE, 12 C. C. 249.

LETTERS PATENT. *See* GRANT.

LIEN. *See* PERMANENT APPROPRIATION.

The judgment in a Supreme Court action by one of the lienors against a construction company which had a contract with the State for the construction of the New York State School of Agriculture at Canton, N. Y., and also against the State and all other lienors, to determine the amount due the contractor from the State, and the amount and validity of the respective liens, awarded to the claimant "the sum of \$1,770.58, with interest from February 5th, 1908, the amount of its lien filed March 11th, 1908, established herein, or so much thereof as said funds properly applicable thereto will pay of the same."

The Court held that the claimant's lien only extended to the amounts due the contractor from the State after the full completion of the contract; that when the contractor ceased work the State owed him \$6,444.15 which was payable on the performance of his contract; that he never complied with the condition or completed his work, and that hence the money was never payable to him nor to the lienors claiming under him. *Ingalls Stone Co. v. State*, 16 C. C. 43

LIFT BRIDGE. *See* BRIDGES.

LIGHT. *See* HIGHWAY.

LIQUOR TAX LAW. *See* STATUTE; TAXES AND ASSESSMENTS.

LOCK-TENDER. *See* WAGES.

LUDINGTON SONS, INC., I. M., v. STATE, 16 C. C. 175

LOGAN, WILLIAM J., v. STATE, 15 C. C. 161.

LOTS.

The land appropriated was a long narrow strip in the city of Oswego on the line of the Oswego canal along the edge of the Oswego river. The claimant contended that its value should be based on "lot values" and that these lots would be specially desirable as they fronted on a State highway, had Oswego river at the back, were forty feet above the river and commanded a beautiful view across and beyond the river.

The Court held that while it would have been feasible at the time of the appropriation to divide this property into lots and put it on the market so divided, it could not be regarded as having had an immediate

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sale value at that time for all the lots so plotted; that the reasonable market value of the property was not based upon desirability alone but upon desirability plus probability, direction, speed and opportunity for city growth; that there was a great deal of desirable land similarly situated in and about Oswego, and that taking all these elements into consideration \$3,000 was a fair measure of the reasonable market value of the land as a whole at the time of the appropriation even if it were to be cut up into lots. *Battle Island Power Co. v. State*, 16 C. C. 120

LYNCH, EDWARD, v. STATE, 11 C. C. 122.

LYNCH, PATRICK, v. STATE, 12 C. C. 36.

LYNCH, RICHARD C., and ano., v. STATE, 12 C. C. 270.

MAIN STREET BRIDGE (BOONVILLE).

Emerson v. State, 16 C. C. 144

MAIN STREET BRIDGE (LOCKPORT).

McDonald v. State, 16 C. C. 83

MAPS.

Effect of filing map, description and certificate of property to be appropriated and service thereof on one or more claimants as tenants in common. *Hinckley v. State*, 15 C. C. 95.

When ancient documents. *Miller v. State*, 15 C. C. 266.

The Holmes-Hutchinson maps of 1834, the Improvement Map of 1838, and the Evershed Maps of 1875, were made pursuant to statute and are competent evidence to prove the State's title to land along Tonawanda creek. *Pierce v. State*, 15 C. C. 260.

Prior to the enactment of the Canal Law (L. 1894, ch. 338) there was no provision of law requiring any map to be made or filed or served upon the property owner of lands to be appropriated by the State. *Miller v. State*, 15 C. C. 266.

Where the title to canal land appropriated prior to the enactment of the Canal Law of 1894 is in dispute, the State may prove its title by showing the actual construction of its canal and works thereon, the Holmes-Hutchinson maps of 1834, the Evershed map of 1875, official records, maps and documents and any other competent evidence which bears upon the title. *Miller v. State*, 15 C. C. 266.

The original Holmes-Hutchinson maps of 1834 or a duly certified copy of a portion thereof may be offered in evidence upon the subject of the ownership of canal land by the State and are presumptive evidence of the title of the State although copies thereof were not filed in the county clerk's office of the county where the land is situate. *Miller v. State*, 15 C. C. 266.

A map made over 30 years ago for the construction of an improvement of the canal and the appropriation of land necessary therefor produced from a Division Engineer's office of the State may be introduced in evidence as an ancient document bearing upon the possession and title of the State to land included within territory proposed to be appropriated according to the map. *Miller v. State*, 15 C. C. 266.

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The so-called Evershed maps of 1875 being over 30 years of age, having been shown to be prepared pursuant to legislative authority and having been produced from the State Engineer's office at Albany, the legal custodian of the maps, or a certified copy of a part of such maps are not presumptive evidence of the title to canal lands because not properly authenticated as required by statute, but are competent evidence of the title of the State to the land included within the blue line shown upon the maps. *Miller v. State*, 15 C. C. 266.

See EVIDENCE; PERMANENT APPROPRIATION.

MASONRY.

I. M. Ludington Sons, Inc., v. State, 16 C. C. 175

MAYER, ALEXANDER U., v. STATE, 11 C. C. 197.

MAYNARD, JOHN S., and ano., v. STATE, 15 C. C. 291.

McCAMMON, GEORGE, v. STATE, 12 C. C. 20.

McDONALD, CHARLES E., v. STATE, 16 C. C. 83

McDONALD, DAVID, v. STATE, 12 C. C. 79.

McFADDEN, WILLIAM D., v. STATE, 15 C. C. 305.

McGOVERN, PATRICK, & CO., v. STATE, 16 C. C. 37

McINTYRE, LENA B., and ano., v. STATE, 11 C. C. 25.

McKEE, JEANNETTE E., and ano., v. STATE, 13 C. C. 220.

MEASURE OF DAMAGES.

Measure of damages discussed generally. *Stevens v. State*, 13 C. C. 111.

See DAMAGE.

MEDICAL CARE.

Claimant's daughter recovered from the State damages for personal injuries. The claimant, her father, expended \$313.05 for the medical and surgical care made necessary as a result of her injuries. The liability of the State for the injuries having been established in the daughter's action against the State (see page 101), it necessarily followed that the father was entitled to be reimbursed by the State for this expenditure. *Kleinmeier v. State*, 16 C. C. 105

MENAPACE, HENRY, BY GUARD., v. STATE, 13 C. C. 91.

MILLER, JOHN R., v. STATE, 15 C. C. 266.

MILTON, THOMAS M., v. STATE, 15 C. C. 300.

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MOTION.	
An application to bring in a party under the authority of section 281 of the Code of Civil Procedure should be refused where it appears that the State makes no claim against the party and the party no claim against the State and the only issue being one between the party and the claimant. <i>Elmore & Hamilton Contracting Co. v. State</i> , 13 C. C. 401.	
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NAVIGABLE STREAMS.

Under the law it is not necessary that a stream navigable in fact shall be actually navigable for its entire distance to make it a so-called navigable stream, but it may be navigable in fact in certain places and unnavigable in fact in other places and in such portions as are not navigable in fact the law applicable to streams not navigable in fact applies. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Where a part of a stream is actually unnavigable by reason of rapids or falls and it does not appear that at any time it has actually been used for purposes of commerce or navigation, such portion is to be treated as non-navigable in fact with all the rights attaching to streams of that character and these rights are not affected by the fact that above or below the unnavigable portion there are reaches that are actually navigable. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Where the construction of a canal by the State utilizes one of the inland rivers so far as practicable and at points where it is impracticable to use the river on account of the fall in the stream, constructs the canal around such portion, the canal at such portion is not to be deemed as improvement of the navigation of the river so as to exempt the State from liability for consequential damages arising from its work of improvement. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

See RIPARIAN RIGHTS.

NEGLIGENCE.

Claimant alleged that while crossing a highway bridge over the canal he stubbed his toe against one of the bridge planks, lost his balance and fell from the bridge to the canal towpath at a point where there was no guard rail along the side of the bridge. The State contended

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that claimant was not on the bridge when the accident happened, but had left the bridge and started down the stone steps leading to the tow-path.

The evidence on the cause of the fall was in direct conflict. From a consideration of the evidence the Court held that the claimant was walking down the stone steps when he tripped and fell and that there was no negligence on the part of the State which caused his original injury.

In addition, the Court found from the evidence that the injuries consequent upon the fall resulted from claimant's failure to take the steps and precautions recommended by his attending physician, and therefore should not be charged against the State. *Debottis v. State*, 16 C. C.... 18

The Court held that negligence on the part of the State will not be inferred from the bare fact that before certain improvements were made on the canal the land was dry, and that after the improvements the land was wet, it being necessary to show that the water which it is claimed caused the damage came from the canal and was due to the State's negligence. *Winn v. State*, 16 C. C..... 31

On August 9, 1913, the claimant while returning from the city of Rochester to his home in Gasport, arrived at the lift bridge over the Erie canal at Gasport about 8:30 P. M. It was dark and his automobile lamps were lighted. He never saw or heard any indications that the bridge was raised until he was so near it that it was impossible to avoid a collision. From a consideration of the evidence the Court held that there was no warning given which claimant could hear or see until just as he was about to collide with the bridge; that the automobile has become one of the most important means of conveyance over our public highways, and that in all situations like the one under consideration it is the duty of the State to give some warning which can be seen or heard by a cautious and watchful driver of such machines. *Hull v. State*, 16 C. C. 47

The claimant, an owner and trainer of race horses, at the invitation of William H. Jones, a State Fair Commissioner, who represented the commission and the State as superintendent in charge of the State Fair grounds at Syracuse, and of Henry S. Nealey, racing secretary of the State Fair Commission, brought his horses to the State Fair grounds to train and race them there. His attention was attracted to some buildings which were to be moved across the race track, but upon calling the attention of Jones to this proposed obstruction of the race track and its dangers, the latter assured him that he would see to it that the track was not obstructed while the claimant was training his horses and that the buildings would be moved when the claimant did not wish to use the track. The claimant, relying upon these statements and promises, went ahead with his training. On June 23, 1913, he was engaged in driving one of his horses called Gay Audobon, a race horse conceded to be of great speed and value, around the track when the moving contractor, an independent contractor, was permitted, without claimant's knowledge, to stretch a cable across the track for the purpose of pulling a building across it. The claimant while driving Gay Audobon at great speed

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ran into the cable, injuring the horse and sulky and throwing the claimant to the ground.

The Court held that even in the absence of any agreement, the State owed the claimant at least the same duty which a municipality owes to the traveler upon the public streets, and that this principle should be applied with special rigor under the circumstances of this case.

The court held further that the claimant did not in this case have to depend for redress upon the above principle of law, but was entitled to recover because of his express understanding with Jones that the track would be kept free from the very obstruction which caused the injury; that the said State Fair Commissioner, representing the State, absolutely failed and neglected to keep his promise to the claimant, and as the direct result of such failure the claimant's horse and sulky were injured; and that the only question to determine was the amount of damages to which claimant was entitled.

The Court allowed the claimant \$159 for the damage to the sulky. Being unable to race his horse in the Grand Circuit that year, he was allowed to recover \$1,675 which he had paid in entrance fees. The rule of damages for the injury to the horse was held to be the difference in its market value before and after the injury, which from the evidence was placed at \$11,000, making a total award of \$12,834. *Gatcomb v. State*, 16 C. C. 77

The claimant's intestate, about 9 p. m. on February 3, 1913, attempted to board a car on Main street in the city of Lockport to go to Buffalo. The car failed to stop and he followed it to where it passed on to the large bridge which the State was building across the Barge canal at Main street, and while still following it he fell through a large hole in the bridge, dropping fifty feet to the rocks below where he met his death. From a consideration of the evidence the Court held that the State in the construction of the bridge had failed in its duty to guard the excavation in such a manner as to make the bridge reasonably safe for travelers, and that the claimant's intestate was not guilty of contributory negligence in assuming that he might lawfully travel a highway upon which a surface car was proceeding safely a few feet ahead of him. *McDonald v. State*, 16 C. C. 83

The claimant for some years prior to May 1, 1913, owned a small tract of land on a public highway. Her premises were located on a precipitous hill rising abruptly from the highway at an angle of about 45 degrees. A stone retaining wall ran along the base of the hill in front of claimant's premises. In July, 1912, the construction of an improved State highway on the general site of the existing highway was begun. The highway contractor, following the plans and specifications of the State, by means of a steam shovel removed the retaining wall in front of claimant's premises and took away a portion of the hillside back of it. The result was that about the end of April, 1913, the greater portion of the hill slid down wrecking claimant's house and barn and ruining her property.

The Court held that it was clearly negligent for the State to have removed the retaining wall at the base of the hill, particularly in view

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of the character of the soil and the precipitous nature of the land, and the location of claimant's buildings and the proximity to the State's operations. *Konner v. State*, 16 C. C. 92

During the progress of the State Fair at Syracuse in 1912, in preparation for a pageant arranged to take place alongside of the Erie canal at North Salina street in that city, a lift bridge over the canal was raised and temporarily made stationary. The claimant was a child twelve years old, who participated in the exercises. At their conclusion it was necessary for her to cross the canal on the bridge in order to reach her home. At the conclusion of the pageant the bridge was being lowered when the claimant was forced forward by the crowd in such a manner that her foot was caught under the bridge and she sustained the injury complained of.

The Court held that, having ample notice of the conditions which in fact prevailed and having taken some measures to meet them, it was the duty of the State to make those measures such as would constitute reasonable precautions for the protection of the public and individuals against injury from the operation of the bridge; that the State had not reasonably fulfilled the duty which was thus cast upon it, and that the negligence of the State was the proximate cause of the claimant's injury.

The Court held that the State could not escape liability by the plea that the claimant's injury was caused by the action of the crowd for which it was not liable. That factor was one which the State was bound to anticipate, and although it was one of the causes of the claimant's injury, it was a combined, concurrent and co-operating cause with that of the State's negligence and not of such character as to deprive the State's negligence of its proximate causal relation to the injury.

The Court further held that the claimant herself was not negligent. She was where she had a right to be and where necessity compelled her to be. She had a right to assume that the State would fulfill its duty to protect her. She was powerless to resist the action of the crowd behind her and no blame can attach to her action at the time of the accident. *Slive v. State*, 16 C. C. 96

In 1912 the claimant then fourteen years of age, while passing the State armory at Schenectady, New York, was injured by ice and snow falling upon her from the armory roof, from which she sustained the injuries forming the subject of this claim.

The Court found from evidence that the guard on the armory roof at the point from which the ice and snow fell was inadequate to prevent such fall; that frequently theretofore large masses of ice and snow had been precipitated from the roof at the same point and the safety of pedestrians on a public street thus menaced; and that the State officials in charge of the armory had ample notice of these things but had taken no measures whatsoever to prevent them.

The Court held that the evidence was such as would establish liability against an individual or a corporation in a court of law or equity and that, therefore, the State, having by section 264 of the Code of Civil Procedure consented that this Court might determine its liability, was

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liable for the injuries sustained. The liability for the condition which resulted in the injuries to the claimant could be predicated either upon the ground of negligence or of nuisance. *Kleinmeier v. State*, 16 C. C. . . . 101

A surveying force from the office of the State Engineer and Surveyor, while surveying certain parcels of land in Medina, N. Y., as a preliminary to the appropriation of some of said land for the Barge canal, drove a wooden stake into the ground in the beaten portion of a dirt path leading to the side door of the house in which claimant resided with her parents, the stake being intended to mark one of the corners of the premises occupied by the claimant and, in fact, so doing. The stake protruded several inches above the surface. The claimant had no knowledge of its having been placed there, or of its existence. While returning to her home at night, her foot struck the stake, causing her to fall to the ground with much violence.

Reviewing the evidence, the Court held that the stake was carelessly and improperly driven, that assuming the State owed a duty to the claimant that it should be properly and carefully driven, the State was negligent, that this negligence was the proximate cause of the claimant's injury, and that the claimant was free from contributory negligence.

On the question of whether the State owed a duty to the claimant which required that the stake should be driven with reasonable care, the Court held that the State did owe such a duty, basing its decision on the general proposition that a man must do the things which he has the right to do, or which are inherently lawful in themselves, if properly done, with reasonable care and due regard for the welfare and safety of the property and person of his neighbor; and that this standard of conduct which applies among individuals also applies, under the facts in this case between the State and its citizens (section 264 of the Code of Civil Procedure).

The Court held that the decisions governing the duty of the owner of real property to persons coming upon it had no application, that the State did not own the premises, and that the question of ownership of the *locus in quo* is of no importance here, further than to leave no doubt that the claimant was where she had a right to be, and was doing what she had a right to do. Assuming that the State was within its rights in making a survey and driving the stake at that point, the claimant has as much right there as the State, its employees, or its stake. *Sannucci v. State*, 16 C. C. 106

The claimant was employed by the State as a cleaner at the State Capitol. He was told to clean certain high windows in the Tax Commission's office, and for that purpose picked out from among several ladders a light fourteen-foot step-ladder. Claimant was on the ladder, on the next step to the top, when the step gave way, then several steps broke one after the other as he struck them until he fell through the ladder to the floor.

Reviewing the evidence the Court held that this ladder was not of proper construction, that the constant use of the ladder, so constructed, weakened it and made it unsafe, that it was unsafe at the time of the

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accident and that the State had failed in its duty to provide him with a safe place in which to work.

There was a conflict of evidence as to whether the cleaning boss had warned the claimant not to use that particular ladder. The Court held that if the cleaning boss felt it his duty to warn claimant about the weakness of the step-ladder, it was his duty to tell claimant to stop using it, that it was the duty of the State to see that it was proper for the purposes for which it was being used and also its duty to inspect this ladder and keep it in repair and safe condition; that the State failed in this duty to the claimant and for this failure was liable to him for the damages directly resulting from the accident.

The Court held, however, that the evidence was insufficient to charge the State for a certain chronic physical condition of the claimant which, so far as the evidence disclosed, might have been due to some prior and continuing cause rather than to the fall itself. *Christian v. State*, 16 C. C. 122

On March 23, 1915, between 7:30 and 8:00 P. M., the claimant was walking westerly in front of the State armory in Elmira. A stairway parallel with the front of the building led down to the basement from the east to the west. The south side and west end of the opening were protected by an iron rail, the north side was closed by the building itself, the east or upstairs end was open. In order to avoid a large crowd collected in front of the armory, the claimant tried to make her way to the right and around the edge of the crowd. She walked directly into the unprotected opening at the east side of the stairway and fell to the bottom of the stairs, severely injuring herself.

The Court held that the position of the stairway, taken in connection with the surroundings, made the use of the sidewalk dangerous; that the State not only should have foreseen, but had foreseen, the danger because it had guarded the opening so as to protect a person coming from the west, but that it had failed in its duty to protect a person coming from the east; and that, under all the circumstances, the claimant was free from contributory negligence. *Brownlow v. State*, 16 C. C. 125

The claimant, while driving a horse and covered wagon, started to cross the lift bridge over the Erie canal on Salina street, Syracuse. The bridge started to rise after he was upon it. He hurried to get across the bridge, but when he reached the further edge the bridge was up about two feet. The horse jumped off the bridge, pulling the wagon after him. The wagon tipped over. The claimant and his horse were injured and the wagon was rendered valueless.

The Court held from the evidence that the claimant was not properly warned that the bridge was to be raised and that he was allowed to get on the bridge through the negligence of the State's employees, which employees were charged with the duty of protecting the public when the bridge was being raised; that having gotten on the bridge and finding that the bridge was about to go up, the claimant was warranted in trying to get off the bridge as soon as possible and in not taking the chances of remaining high up in the air with his horse and wagon until the

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bridge was lowered; that under the circumstances he was not charged with the same duty of care as he would have been if he had had plenty of time to think and to decide upon the best course.

The claim was allowed as to the direct injuries to the claimant and his horse and the loss of his wagon. The Court held, however, that the evidence failed to show that the claimant suffered from a chronic condition alleged to have resulted from the effects of a blow on the head; and refused any award on this score. *France v. State*, 16 C. C. 137

On August 11, 1913, claimant was driving an automobile along State highway No. 27, which is the main traveled route between the Adirondack section and the main east and west highway across the State passing through Utica. It was necessary for her to turn sharply to the northeast to pass over Main street bridge crossing the Black River canal at Boonville, N. Y. Striking the planks near the right side which ran lengthwise on top of the floor, she turned the car sharply to the left and ran against a suspension rod on the left side. With the assistance of several people, the car was pulled back, straightened around, the engine cranked, and she got back into the machine. She started the car forward across the bridge when the bridge structure settled at one corner. Claimant, to avoid tipping over, turned the car "head on" in the direction of the settling. When the bridge struck the edge of the canal bank and stopped, part was on the bank and part in the canal. The car was right side up, tipped sharply forward and directly against the right side of the bridge at its lowest part as it collapsed. The other three corners of the bridge remained substantially in place. Claimant was thrown forward against the wheel and back against the seat and received injuries for which she brought the present claim.

The evidence showed that the State had actual notice of the inadequacy of the bridge. The Superintendent of Public Works in 1912 had approved in writing a bill providing for the building of a new bridge and this bill became a law fifteen months before the accident. The Court held that the State was clearly negligent in permitting the use of the bridge under such circumstances, that although the claimant's course when she first came upon the bridge was erratic, nevertheless at the time of the actual falling of the bridge her car was in a proper place and nothing was done by her at that time to cause the bridge to give way and settle down. The manner of the settling of the bridge and the fact that it did not commence to settle where claimant hit the suspension rod disproves the State's contention that the collision of claimant's auto with the suspension rod was a contributing cause of the accident. *Emerson v. State*, 16 C. C. 144

Claimant had for several years traveled between Schenectady and Rotterdam Junction on a forty-passenger auto bus. On April 24, 1915, she, with other people, boarded this bus at Schenectady, paid her fare and became a passenger. While proceeding westerly on a State highway, the bus passed on to the bridge over the Erie canal known as Van Slyke's bridge. The bridge suddenly collapsed, carrying the bus and occupants down about twenty feet to the canal bed, injuring the claimant and other passengers.

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Six years before the accident the section superintendent in the employ of the Superintendent of Public Works had placed sign boards near each end of the bridge. The notice on the sign boards was the usual notice signed by the Superintendent of Public Works that loads of more than two and one-half tons were forbidden to cross the bridge. At the time of the accident one of the signs remained near the Rotterdam end of the bridge, but there was no proof that the sign board at the Schenectady end was in place at that time.

From the evidence, including a very careful inspection of the pieces of bridge timbers introduced in evidence as exhibits, the Court held that the bridge was not only unsafe for a two and one-half ton load but was unsafe for any load, and that the State could have discovered this condition by a proper test, but that no such test was ever made.

Claimant had passed over the bridge in this forty-passenger auto bus several times a week for several years, and to all appearances the bridge would hold much more than two and one-half tons, for she had been many times a part of a load much heavier than two and one-half tons which had gone safely over the bridge. The Court held that, whatever the form of the notice, the fact that traffic was not actually stopped over the bridge gave the notice the character of a warning of its not being safe for more than two and one-half and could not be taken as a prohibition to use the bridge for more than two and one-half tons.

If the Superintendent of Public Works knew or had reason to believe that the bridge was not safe for loads weighing more than two and one-half tons it was his duty to have a test made and find out what was the actual condition of the bridge. If found to be in a dangerous condition for two and one-half tons or any other usual load which might be expected to pass over such a bridge in such a place, he should cause to be put up signs to attract the attention of all persons who might desire to use the bridge, and then within a reasonable time, make such repairs, changes or replacements as would make the bridge a proper bridge for the traffic to be accommodated at that locality at that time. Small sign boards placed over to one side of the road and left there for five years do not constitute the kind of protection to which the citizens of this and other States are entitled when they are passing over bridges built, owned and maintained by the State of New York. *Beeman v. State*, 16 C. C. 153

The claimants, husband and wife, started out on an automobile trip. The wife had their only child, about three years old, on her lap. Proceeding northerly from their home in Cortland they passed on to that portion of the Pompey-Jamesville State highway known as Barrows Hill. This highway was being resurfaced with a mixture of oil and stone. It was maintained by the State under the patrol system. The husband, in driving over the newly placed oil and stone on the road south of Barrows Hill, had found it hard and good wheeling, but too much oil had been placed on some portions of the easterly side of the macadam leading down Barrows Hill, producing a slippery and dangerous condition. As the car started down Barrows Hill the hind wheels slewed to the right and off on to the dirt roadway to the east of the

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macadam, and the right front wheel also went off the macadam. The husband swung the front of the car to the right and thus brought the four wheels on to the dirt portion of the roadway. The machine was in high gear. He then turned the front wheels to the left and put on more gas. The left front wheel got into a groove between the macadam and dirt, and the car proceeded down the hill with the left front wheel grinding against the stone shoulder. Suddenly the left front tire was torn from the wheel, the machine started to the left and diagonally across the macadam, the back end slewed to the right on oily surface, and finally rolled over as it approached the westerly side of the macadam which had much less oil on it and was therefore much dryer. The claimants were seriously injured.

There were two phases of the accident — the slewing off the macadam and the slewing across the road after the car got back on again. The Court held that the first slewing was caused directly by the negligence of the State; that the second was the result of the State's negligence both in the original slewing and the slippery condition where the second slewing occurred, but that the husband was also negligent in putting on power and trying to push over the shoulder without first putting on his brakes and getting into lower gear, and that his contributory negligence barred his recovery.

The Court held, however, under the authorities in this State, that the negligence of the husband could not be imputed to his wife, and made an award in her favor in the sum of \$9,000.

The State contended that the work of oiling and stoning was the work of an independent contractor and, not having been accepted by the State at the time of the accident, the State was relieved from liability. The Court held, however, that the State could not thus relieve itself from liability. The evidence showed that the road remained in control of and under the jurisdiction of State authorities, and was actually being inspected and patrolled by them while the work was in progress; in addition, the road was at the time of the accident open for public travel. *Shearman v. State*, 16 C. C. 159

See CATHERINE STREET BRIDGE, SYRACUSE; CHAPEL STREET BRIDGE, LOCKPORT; ERIE STREET BRIDGE, BUFFALO; EXCHANGE STREET BRIDGE, ROCHESTER; PLYMOUTH AVENUE BRIDGE, ROCHESTER; SALINA STREET BRIDGE, SYRACUSE; STATE STREET BRIDGE, BUFFALO; STATE STREET BRIDGE, SYRACUSE; TWENTY-THIRD STREET BRIDGE, WATERVLIET; WEST MAIN STREET BRIDGE, ROCHESTER.

See LEAKAGE, OVERFLOW AND FLOODING; PERSONAL INJURY; BRIDGES; CULVERTS.

NEW ENGLAND BRICK CO. v. STATE, 15 C. C. 313.

NEWTON, WILLIAM H., AND ANO. v. STATE, 13 C. C. 246.

NEWTON, WILLIAM H., AND ANO. v. STATE, 13 C. C. 247.

NEW YORK, CITY OF, v. STATE, 16 C. C. 21

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NEW YORK STATE SCHOOL OF AGRICULTURE AT CANTON. *See*
DAMAGE; LIEN.

Ingalls Stone Company v. State, 16 C. C. 43

NIAGARA RESERVATION.

Where the State owns a reservation like that at Niagara Falls and for its management has created a board whose duty it is to "manage" and "control" the property and pay into the treasury all "rents, issues and profits" thereof, inviting the public to use the reservation and an inclined railway operated in connection therewith, it is bound to use reasonable care to see that persons using the railway are not injured, and for the absence of such care and for its negligence, where there is no contributory negligence on the part of the claimant, the State is liable. *Burks v. State*, 13 C. C. 153.

In conducting a reservation like the Niagara Reservation managed as stated by commissioners and operating an inclined railway for the use of which it exacts a fare from passengers, the State is not discharging a governmental function and is liable like a private corporation under the same facts. *Burks v. State*, 13 C. C. 153.

Under such conditions where the State exacts a fare for the use of the inclined railway by passengers it is to be treated in its relation to them as a common carrier and is bound to exercise more than ordinary care, and for the absence of such care it is liable, provided the claimant is free from contributory negligence. *Burks v. State*, 13 C. C. 153.

NINETEENTH STREET BRIDGE (WATERVLIET).

Murray v. State, 16 C. C. 111

NON-NAVIGABLE STREAM.

Construction of conveyance of land bounded by, *see Hinckley v. State*, 15 C. C. 95.

NON-RESIDENT. *See JURISDICTION.*

NORTH SALINA STREET BRIDGE (SYRACUSE).

Slive v. State, 16 C. C. 96

France v. State, 16 C. C. 137

NOTICE.

Where a claim for negligence, in allowing an aqueduct to leak and fill up the arches over a creek with accumulations of ice, rests upon a notice given to an officer of the State of the conditions, no recovery can be had where it appears that had the officer acted promptly upon the receipt of the notice, the damages would have happened despite anything that the State could have done. *Town of Whitestown v. State*, 13 C. C. 269.

NOTICE OF INTENTION.

Claimant failed to file the notice of intention, which is required by section 264 of the Code of Civil Procedure in claims other than for the appropriation of land, and contended that no such notice was required because the alleged damage was due to the permanent improvement made

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by the State in constructing a dam which interfered with the free flow of water in the creek and caused the flooding. The Court's attention however was not called on the trial to the fact that no notice of intention had been filed.

The court held that the service of the notice of intention is jurisdictional and cannot be waived. The jurisdiction of the Court of Claims to hear any claim rests upon statute and in this instance the statute says that no claim shall be "maintained" against the State unless such a notice has been filed. This language goes to the very right of the claimant to maintain the action and unless the notice is filed the Court has no jurisdiction to entertain the claim, irrespective of any question as to whether or not the attention of the Court was called to the failure to file it.

Butterfield v. State, 16 C. C. 24

See also the decision of the Court of Appeals to the same effect in Buckles v. State, 16 C. C. 303

In the decision of the Court of Appeals in Butterfield v. State, the additional point was decided that even if the claim itself was filed in the clerk's office of the Court of Claims and in the Attorney-General's office within the six months' period, that fact did not dispense with the necessity of filing the notice of intention in both of said offices. 16 C. C. 308

The word "appropriation" has a varying meaning but it cannot be interpreted to include a case of temporary or occasional flooding arising from an improvement constructed on a stream below the point of flooding. The exception of cases where the State has made an appropriation of land is due to the fact that the appropriation is the act of the State itself; it has full knowledge of the facts, and therefore no notice of intention is necessary. Butterfield v. State, 16 C. C. 24

The final estimate was made and signed by the State Architect on July 14, 1914, and the notice of intention to file the claim was filed on December 30, 1914. The Court held that the notice was filed in time; that the six months' period under section 264 of the Code of Civil Procedure did not commence to run until the liability accrued, and that the liability accrued when the State Architect certified the final payment, in which he did not include the items set forth in the claim and thereby rejected them. W. L. Waples Co. v. State, 16 C. C. 54

The State contended that the six months' period within which the notice of intention to file the claim must be filed under section 264 of the Code of Civil Procedure, should be computed from the date of the tort, and not from the date of the injury resulting to the claimant therefrom. The Court held that this contention was unsound, that the claim of the claimant did not "accrue" until she had suffered the injury to her premises with its resultant loss, and that the notice of intention had been filed within six months from this time. Konner v. State, 16 C. C. 92

In claims where the damages are continuing the claimant cannot go back in his proof of damages further than six months preceding the filing of the notice of intention.

Park v. State, 16 C. C. 132

NUISANCE.

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In 1912 the claimant then fourteen years of age, while passing the State armory at Schenectady, New York, was injured by ice and snow falling upon her from the armory roof, from which she sustained the injuries forming the subject of this claim..

The Court found from evidence that the guard on the armory roof at the point from which the ice and snow fell was inadequate to prevent such fall; that frequently theretofore large masses of ice and snow had been precipitated from the roof at the same point and the safety of pedestrians on a public street thus menaced; and that the State officials in charge of the armory had ample notice of these things but had taken no measures whatsoever to prevent them.

The Court held that the evidence was such as would establish liability against an individual or a corporation in a court of law or equity and that, therefore, the State, having by section 264 of the Code of Civil Procedure consented that this Court might determine its liability, was liable for the injuries sustained. The liability for the condition which resulted in the injuries to the claimant could be predicated either upon the ground of negligence or of nuisance. *Kleinmeier v. State*, 16 C. C. . . . 101

See NEGLIGENCE.

NUSSBAUM, MYER, v. STATE, 11 C. C. 147.

OAK ORCHARD CREEK.

Where the State constructs a feeder utilizing a creek for a portion of the way as a part of the feeder and connects three separate watersheds, and negligently permits gates at the head of the feeder to become out of repair so as to allow water to escape through or under them, and allows the banks of the feeder to become depressed in places and out of repair, it is liable for damages occasioned by flooding due to its own negligent acts. *Ostrander v. State*, 11 C. C. 175.

Ostrander v. State, 11 C. C. 72.

Acer v. State, 11 C. C. 72.

Post v. State, 11 C. C. 72.

Gray v. State, 12 C. C. 71.

McDonald v. State, 12 C. C. 79.

Zimmerman v. State, 12 C. C. 88.

Acer v. State, 16 C. C. 50

O'BRYAN, LINA, ADMX., v. STATE, 15 C. C. 295.

OFFICERS. *See PUBLIC OFFICERS.*

OLSZEWKA, VERONICA, v. STATE, 13 C. C. 153.

ONEIDA RIVER.

PERMANENT APPROPRIATION:

Vincent, Hattie A., v. State, 15 C. C. 229.

O'NEIL, FRANK S., v. STATE, 16 C. C. 74

ONTARIO KNITTING COMPANY v. STATE, 15 C. C. 371.

OSLEY, ELIZABETH, v. STATE, 15 C. C. 277. Page.

OSTRANDER, CHARLES, v. STATE, 11 C. C. 72.

OSTRANDER, JAY N., v. STATE, 11 C. C. 175.

OSWEGO RIVER.

The rule as to the Oswego river, a nontidal, a nonboundary stream, is that the title to the bed and the riparian rights incident thereto go with the ownership of the land bounding the stream unless reserved. *Fulton Light, Heat & Power Co. and ano., v. State*, 12 C. C. 179.

OSWEGO RIVER APPROPRIATION.

Battle Island Power Co. v. State, 16 C. C. 120

OVERFLOW. *See* LEAKAGE, OVERFLOW AND FLOODING.

OVERHEAD EXPENSES.

See CANALS; CONTRACT; DAMAGE; HIGHWAY.

PALMER, LOWELL M., ET AL., v. STATE, 15 C. C. 55.

PARK, EMMA B., v. STATE, 16 C. C. 132

PARK AVENUE IMPROVEMENT. *See* HIGHWAY.

PARKER, ROBERT, v. STATE, 13 C. C. 17.

PARTY.

Where upon the hearing of a claim for permanent appropriation it appears that other parties than those named in the claim have an interest in the claim, they will be brought in by consent, and the interest of each determined and an award made accordingly. *Kuhn and Buffalo, Rochester & Lockport Ry. Co. v. State*, 12 C. C. 246.

An application to bring in a party under the authority of section 281 of the Code of Civil Procedure should be refused where it appears that the State makes no claim against the party and the party no claim against the State and the only issue being one between the party and the claimant. *Elmore & Hamilton Contracting Co. v. State*, 13 C. C. 401.

PASSORELLI, FELICE, v. STATE, 16 C. C. 67

PATENTS. *See* GRANT.

PATRICK McGOVERN & CO. v. STATE, 16 C. C. 37

PECKSPORT BRIDGE (MADISON COUNTY).

Under the provisions making the State liable only where upon the same facts an individual or corporation would be liable (*Canal Law*, § 47; *Code of Civ. Proc.*, § 264) the State is entitled to the benefit of the provisions of the Highway Law (*L. 1890, ch. 560, § 154; L. 1909, ch. 30, § 331*) relating to the load which town bridges are required to bear. *O'Bryan v. State*, 15 C. C. 295.

Where the statute exempting a town from liability for the collapse of a bridge under a load of four tons or over (*L. 1890, ch. 30, § 154*) was amended by increasing the load to eight tons or over, the State has

PECKSPORT BRIDGE (MADISON COUNTY) — Continued. **Page.**

a reasonable time after the amendment takes effect to reconstruct its bridges to meet the requirements of the increased load and where an accident occurs 103 days after the amendment takes effect a reasonable time has not elapsed to charge the State with negligence for delay in reconstructing a bridge which fell with a load exceeding four and one-half tons. *O'Bryan v. State*, 15 C. C. 295.

The State was held to be exempt from liability where an engineer undertook to drive over a canal bridge in a town a load weighing four and one-half tons and he was held to have assumed the risk in passing over the bridge where he had examined the bridge and after such examination reached the conclusion that it was safe and undertook to cross and went down with the bridge. *O'Bryan v. State*, 15 C. C. 295.

PERKINS, ALBERT E., ET AL. v. STATE, 13 C. C. 96.

PERKINS, LAVINIA C., v. STATE, 15 C. C. 282.

PERMANENT APPROPRIATION.

Where land is permanently appropriated for a State fish hatchery under an enabling act which provided that upon failure to agree the claimant may submit his claim to the Court of Claims for the value of such land, the claimant is entitled not only to the value of the land taken but to the damages to the remainder of the land not taken. *Bonneville v. State*, 12 C. C. 173.

Where after an appropriation by the State of land covered by an unpaid assessment there is a foreclosure of the assessment and in the judgment an apportionment of the assessment upon the land actually taken, so much of the award as represents the value of the land taken which is covered by the apportioned assessment must be paid to the party designated in the judgment in satisfaction of the assessment. *McKee and ano. v. State*, 13 C. C. 220.

Upon the service of a notice of appropriation by the State upon the owner the appropriation is complete and the owner becomes divested of his land and becomes entitled to a claim against the State for the compensation to which he may be entitled under the constitution, and the purchaser of the land under proceedings taken to foreclose an assessment acquires no right to the award made in the appropriation proceedings. *McKee and ano. v. State*, 13 C. C. 220.

While it is proper to receive evidence as to the quantity of moulding sand on a farm and the availability of the frontage of the farm for building lots as bearing upon the value of the farm, the compensation for the taking of the farm is to be estimated by the market value of the property. *Gregg v. State*, 13 C. C. 38.

Where in 1826 there was no specific appropriation by the State defining the rights acquired by it but long continued possession since that time acquiesced in by both parties, the State and the owner's rights will be deemed to have been fixed by the acts of the parties confirmed by such documentary and other evidence as is available. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

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The rights acquired by claimants through previous appropriations of the State to draw water through certain openings are property rights protected under the Constitution and not subject to be taken by the State under its reserved power to improve the navigation of a stream. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Although the State may have a right to improve the navigation of a stream without making compensation for consequential damages it may still provide for compensation and pay such damages as its acts occasion. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Where the State appropriates a municipal building in a village for the Barge canal its value will not be based upon the cost of reproducing the building nor upon its value to the village but upon the market value of the property in the condition in which it was at the time of the appropriation. *Village of Whitehall v. State*, 13 C. C. 139.

Wood creek, which formed a part of the ordinary route of travel between the Hudson river and Lake Champlain from earliest times, and was used by the Indians and later by the Colonists, was regarded as navigable, and in the patent from the English Crown to Philip Skene, was excepted and reserved "as a common highway for the benefit of the public." Philip Skene having been attainted of treason by the Legislature of the State of New York in 1779, and his lands sold by the Commissioners of Forfeiture, those claiming under the Skene Patent have no interest in the bed of Wood creek, and the State may take a portion thereof for its canal system without compensation to the riparian owners. *Johnson v. State*, 13 C. C. 55.

The State appropriated for the purposes of the new Barge canal, the property of D. Before the appropriation D had leased the property to the claimant, B, which lease was duly recorded in the County Clerk's office of the county where the property was situated. The lease had five years to run at the time of the appropriation. B, the lessee and claimant, was in the possession and occupancy of the property when it was appropriated. After the appropriation the State made a settlement with D, the owner and lessor, paying him an agreed sum for the property. B, the lessee in possession and occupancy under the recorded lease, was not settled with. *Held*, that any settlement under such conditions, with the owner, D, by the State, could not affect the rights of the claimants herein, and that they were entitled to recover the value of their lease at the time of the appropriation. *Baker and ano. v. State*, 13 C. C. 22.

The filing of a map, description and certificate of property to be appropriated, and the service thereof on one or more claimants as tenants in common but not upon all, effects a tentative appropriation, which becomes complete by service on the others at a later date, but by operation of law, the later service relates back to the earlier and the appropriation is regarded as having been made at that time. The service, whenever made, is part of one transaction and service on a single tenant in common paralyzes the action of all, for the property can not be improved except at the owner's risk or sold except at the owner's sac-

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rice. It would not be equitable for the State to claim that it did not take the property until the last service was made, when the delay of years in completing service is wholly its own fault and it has certified on the map filed at the initiation of the proceeding that the property is necessary for a public improvement, and that it has been permanently appropriated therefor, which involves and finally results in the acquisition of every interest in the land, especially where the property is at once entered upon and taken possession of by the State and the construction of a huge dam for a reservoir is begun thereon. *Hinckley v. State*, 15 C. C. 95.

When a highway, land or water, has been dedicated to the public for a purpose, the sovereign power may take or improve such highway for the same general purpose or object, without compensation. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

The power of eminent domain is a natural and inherent attribute of Sovereignty. The Constitutional provision "that private property shall not to be taken for public use without compensation" means that the compensation shall be just to the public as well as to the individual. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

In case of injuries inflicted through the power of eminent domain, the owner of the property should use reasonable and proper precautions to prevent or decrease the injury and should not be allowed to increase, swell or enhance the injury, or the damages sustained, in bad faith. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

In proceedings for determining the compensation for rights taken under the power of eminent domain loss of profits may be taken into account with other elements in determining the value of the property but are not the measure of damages. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

The statutes of the State down to the enactment of the Canal Law of 1894, (L. 1894, ch. 338) did not require the making and filing of a map or the serving of a notice of appropriation upon the property owner as a part of the act of appropriation, but merely provided that the State should take possession of the land permanently appropriated, the damages, if any, being obtained through the canal appraisers. *Pierce v. State*, 15 C. C. 260.

By the construction of a dam, raising the water of Tonawanda creek, and flooding the property in dispute, and by the construction of an embankment and ditch, thus entering upon and taking possession not only of the land covered by the embankment and ditch, but of the disputed land intervening between the embankment and Tonawanda creek, the State complied with the statutes relating to permanent appropriations. *Pierce v. State*, 15 C. C. 260.

Prior to the Canal Law (L. 1894, ch. 338) the permanent appropriation of land was complete when the State took possession of the same and if no claim was made within a year after such appropriation the owner lost his interest in the property and the State acquired a title in fee. *Miller v. State*, 15 C. C. 266.

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Where it appears from the evidence that Tonawanda creek was a part of the canal system of the State; that the dam was built near its outlet; that it was made navigable; that the Holmes-Hutchinson maps of 1834 of the canal system of the State show the creek as a part of the canal system with a towing path on the southerly side of the creek; that between 1838 and 1842 the State constructed an embankment through the property on the north side of the creek for the purpose of obviating flooding upon which embankment the buildings of claimant were constructed; that the map under which the improvement was made shows a green line indicating the land to be appropriated, which green line included the land in dispute; that this map was over 30 years of age and was produced from the Division Engineer's office of the State; that pursuant to legislative authority maps were prepared of the canal system of the State known as the Evershed maps of 1875, which were filed in the State Engineer's office, a copy of a part of which was offered in evidence showing the land in dispute within the blue line; that an appraisement was made of a two-thirds interest in the land in question for damages arising from the appropriation of the other one-third interest; the State has acquired title in fee to the land in question. *Miller v. State*, 15 C. C. 266.

As the original title to most of the land of the State is in the State itself, it is subject to be taken for public purposes by the State upon payment of the market value of the property, which is the compensation provided for by the Constitution. *Smith v. State*, 15 C. C. 293.

Where the State Constitution provides that private property shall not be taken for public use without just compensation and that no person shall be deprived of property without due process of law and the statute for the construction of a State canal provides that the State Engineer shall take such property as in his judgment shall be necessary and the lines of the canal are fixed at the time of the appropriation, his judgment must be limited to the actual necessities of the canal as approved and legally planned and an appropriation outside of the lines of the canal though consented to by the owner, not necessary for spoil, buildings or other public purposes in connection with the construction and operation of the canal is unauthorized, illegal and void. *Ontario Knitting Co. v. State*, 15 C. C. 371.

Where the State appropriated land upon which there was a factory and an engine and derrick resting upon substantial foundations, all of which were used in connection with the business conducted on the property, *Held*, that the State could not take the bare land and subject the owner to the loss of the depreciation of such structures and machinery as he had placed upon it; that the rule that applied is that which obtains between vendor and vendee, which is that a purchaser of the property would have acquired the engine and derrick with the building as a part of the plant; that there was such an annexation and adaptability of the property as to constitute the engine and derrick a part of the realty; that they were securely attached to the freehold and were used in connection with the business; that they were a part of the plant and essential to the operation thereof and could not be removed except with such a depreciation in

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value as would amount to an appropriation without just compensation.
Phipps v. State, 15 C. C. 392.

The question as to the power of the State to reduce an appropriation at any time before a judgment has been entered or the compensation has actually been paid is an exceedingly important one to the State, and being merely one of statutory construction should be answered favorably to the State unless by express language of the statutes or by a fair implication therefrom title to land appropriated vests at some earlier period. Adirondack Woolen Co. v. State, 16 C. C. 1

The statutes preceding the Barge Canal act and the decisions made thereunder are uniform in holding that the title did not vest when the State entered upon the land and thereby appropriated it, but rather when the award had been made and recorded or the Statute of Limitations had run against the owners of the property. This unbroken record of statutory enactment and judicial decisions should have great weight in interpreting the Barge canal act upon the subject under discussion in view of the omission from that statute of any express language prescribing when the title shall vest in the State. Adirondack Woolen Co. v. State, 16 C. C. 1

History of the statutes preceding the Barge canal act of 1903 relating to the appropriation of lands for canal purposes, the procedure under these acts, and the judicial decisions construing them, stated at length. Adirondack Woolen Co. v. State, 16 C. C. 1

The Barge canal act is but a step in the development of legislation on the subject of appropriations, and there is nothing in that act which indicates an intention on the part of the State to change the rule which had previously existed for over three-quarters of a century, that the title to the property appropriated should not vest in the State until an appraisal had been made and recorded or the Statute of Limitations had run. Adirondack Woolen Co. v. State, 16 C. C. 1

If the State has occupied property under a permanent appropriation for which a notice has been served and subsequently releases a part of the property, the owner is clearly entitled to such damages as he sustained during the occupancy. Where the appropriation has been changed, the owner would be entitled to compensation as to a permanent appropriation for the property described in the final appropriation and for such damages as he sustained by reason of the earlier appropriation. Such being the case, it would seem that property owners should assist rather than oppose a construction which the State seeks to place upon the Barge canal statute authorizing it to reduce appropriations subsequent to the service of the notice of appropriation and before judgment has been entered or the compensation paid or the Statute of Limitations has run. Adirondack Woolen Co. v. State, 16 C. C. 1

In construing statutes it is the rule, where there is an opportunity for a difference of opinion as to the proper construction, to adopt that construction, other things being equal, which carries out some general public policy or serves some public interest. Following this rule, it seems a salutary one in the light of what has been said to adopt the construction that

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under the Barge canal act title does not vest in the State until an appraisalment has been made and recorded or paid, that is, until a judgment has been entered in the Court of Claims or paid, or until the Statute of Limitations has run, or an agreement has been made with the proper officials. This construction of the Barge canal act will not injure persons to the slightest extent whose property has been appropriated. They are guaranteed just compensation by the Constitution, and whatever the acts of the State, whether they be temporary or permanent in their character, a remedy exists in favor of those who have been injured. *Adirondack Woolen Co. v. State*, 16 C. C. 1

An award was made for land appropriated and for three small frame buildings on the land. The Court held, however, that the evidence was insufficient to justify an award for the loss of a mineral spring on the land and two gas wells. The proofs as to the successful operation of the business of selling mineral water were very unsatisfactory; furthermore, the decedent had before the appropriation made a gift of the mineral spring to a son, since deceased, and if there had been any profit in the operation of the mineral spring it did not belong to the claimants. As to the gas wells, a consideration of the entire testimony showed that little, if any, gas had been used from the wells at the time of the appropriation. *Knight v. State*, 16 C. C. 66

Claimant owned land adjoining a roadway known as the Butts road, his title running to the center of the highway. The appropriation was for the purpose of an approach to a new bridge over the Barge canal. The new approach shut off the former access to claimant's house and barn. The new construction also closed two conduits which had formerly diverted water from the claimant's premises, and water flowed down upon the claimant's premises from the embankment of the approach during every rain. The Court made a total award of \$750 for all the damages resulting to the claimant from the appropriation. *Passorelli v. State*, 16 C. C. 67

The claimants are the owners of a farm in the city of Rome, N. Y., of about 270 acres. In June, 1908, the State appropriated a portion of this farm for the purposes of Barge canal construction and in 1909, the then special examiner and appraiser of canal lands agreed with the claimant to pay \$3,800 for the land actually taken. This agreement contained the following clause: "In this case the owner has a claim for damages by reason of cutting off certain lands from access. This damage, if any, cannot be determined until such time as further appropriations are made from same lands." On February 15, 1910, the claimants received the \$3,800 specified in the contract. No further appropriation, however, was made and the years passed by without any payment from the State to the claimants for the balance of their damage and without any adjudication of the same. On October 18, 1915, the claimants filed their claim for the damages resulting to the remainder of the farm from the appropriation made in June, 1908. This claim was filed pursuant to chapter 640 of the Laws of 1915, which act took effect May 14, 1915, and which provided in part that the Court "shall have jurisdiction of and may hear and deter-

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mine any claim against the State heretofore accrued which shall be filed within one year after this act takes effect for compensation of damages for or on account of the appropriation by the State of any lands " in connection with the improvement of the canals forming the Barge canal system.

The State contended that this act of the Legislature was unconstitutional as to this particular claim under article 7, section 6 of the State Constitution, and that the claimants herein could not recover because their claim accrued more than six years prior to the filing of the same. The Court, however, held that the State had recognized this indebtedness to the claimants both by the written agreement made on December 1, 1909, and by the payment of a portion of the damages which it owed the claimants on February 15, 1910, and that as the claim had been filed within six years after these dates the indebtedness would not have been barred as between citizens of the State and that therefore the claim was filed in time in this Court.

The Court held that the evidence established the fact that the farm prior to the appropriation was of the value of \$11,000, but after the appropriation it was worth not to exceed \$2,000. Of the difference, namely, \$9,000, the State had paid \$3,800, leaving a balance due claimants of \$5,200, to which they are entitled with interest from the date of the appropriation. Tuttle v. State, 16 C. C..... 87

A portion of land appropriated was in the old bed of the Mohawk river. The Court's award for this portion of the land was based on the understanding that this land had been a part of the Cosby Manor grant, and that under the decision of the Court of Appeals in the case of Williams v. City of Utica, 217 N. Y. 162, construing this grant, the claimant at the time of the appropriation owned it on fee.

Davies v. States, 16 C. C..... 115

Smith v. State, 16 C. C..... 148

The certificate appropriating land was signed by the special deputy engineer and it was contended that under the decision of the Court of Appeals in Ontario Knitting Co. v. State, 205 N. Y. 409, the appropriation was void. The Referee held that the facts were different in the present case and that the appropriation was valid under the Referee's decision in Pratt v. State, affirmed by the Court of Appeals in 219 N. Y. 554. Lane Brothers Co. v. State, 16 C. C..... 238

PERSONAL INJURY.

Where there are open and well known defects in the appliances with which a claimant is working and the place where he is called upon to do his work is unsafe, he is not chargeable with negligence if he remains until injured if he has been promised a reasonable time before the accident that the defects would be remedied and remained relying upon these promises. Post v. State, 13 C. C. 99.

Where a person was employed by the State to work on the canal and was injured by the handle of a pile-driver flying from the drum while a weight was descending, the machine having been accidentally thrown into gear: Held, that the State was liable. Hazzard v. State, 11 C. C. 160.

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Where an employee of the State is directed to do certain work and has charge of the work to be done, having previously performed similar work and selects his own tools and appliances and directs their use, the State is not liable if he is injured in the performance of the work. *Ruthenberg v. State*, 11 C. C. 189.

The State is not liable for the negligence of a contractor on the barge canal where he had left unguarded an excavation near a temporary road used by the public into which excavation claimant's team was driven. *Coolidge v. State*, 11 C. C. 200.

Berinstein v. State, 13 C. C. 143.

Burks v. State, 13 C. C. 153.

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Olszewska v. State, 13 C. C. 153.

Taft v. State, 13 C. C. 250.

See BRIDGES; DAMAGES; NEGLIGENCE.

PETER F. CONNOLLY CO v. STATE, 16 C. C. 216

PHIPPS, WILLIAM W., v. STATE, 15 C. C. 392.

PIERCE, HENRY J., v. STATE, 15 C. C. 260.

PILE DRIVER. *See* PERSONAL INJURY.

PLYMOUTH AVENUE CANAL BRIDGE (ROCHESTER).

Claimant seeks to recover damages for a personal injury received by being thrown from his bicycle into the street by the raising of a lift bridge over the canal in the city of Rochester, New York, through the negligence of the State and its servants in raising the bridge while claimant was crossing the same. It appears from the testimony that a gasoline launch was in the canal going west and had signaled for the bridge to be raised. That one of the bridge tenders sounded the gong several times as a signal that the bridge was to be raised, while the other bridge tender took a red light and went into the center of the roadway within a few feet of the bridge to warn persons approaching the bridge. The street approaching the bridge was paved with asphalt and claimant passed the bridge tender without being heard by him. The bridge tender saw claimant just as he went on to the bridge and called to him to stop. The claimant rode on to the bridge after the warning signal had been given, passed the bridge tender with the red light, continued on his way across the bridge and rode off the bridge at the further end when it was about a foot above the street and received the injury complained of. *Held*, that there was no negligence shown on the part of the State, and also that claimant was guilty of contributory negligence and could not recover. *Berinstein v. State*, 13 C. C. 143.

POMPEY-JAMESVILLE STATE HIGHWAY.

Shearman v. State, 16 C. C. 159

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POST, ANTHONY, v. STATE, 13 C. C. 99.

POST, ROSWELL W., v. STATE, 11 C. C. 72.

PRESCRIPTION.

Where openings were left in a State dam or pier in the course of the appropriations by the State in 1826 through which since the appropriations riparian owners have been drawing water for the operation of mills, they will not be permitted to claim riparian rights upon the basis of any increased openings. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Where a dam was constructed in 1865 and flash boards had been used thereon ever since and no claim for flooding resulting therefrom was made by claimant until 1901, the claim is not tenable, as under the Revised Statutes (§§ 48, 52) and Laws 1830, chapter 293, and Laws 1866, chapter 836, the State acquired a permanent easement to flood the land within one year after the premises had been flooded. *Ely v. State*, 11 C. C. 65.

Interruption in the continuity of the user of flash boards does not affect the right to an easement acquired under the statutes unless the circumstances show an intention of abandonment. *Ely v. State*, 11 C. C. 65; *Smith & Powell Co. v. State*, 11 C. C. 87.

Where a dam was constructed in 1865 and flash boards had been used thereon ever since and no claim for flooding resulting therefrom was made until 1896, the claim is not tenable, as under the Revised Statutes (§§ 48, 52), and Laws 1830, chapter 293, Laws 1866, chapter 836, the State acquired a permanent easement to flood the land after the lapse of one year from the time the premises were flooded. *Klein v. State*, 11 C. C. 83.

Where a dam was constructed in 1865 and flash boards had been used thereon ever since and no claim for flooding resulting therefrom was made by claimant until 1900, the claim is not tenable, as under the Revised Statutes (§§ 48, 52), and Laws 1830, chapter 283, and Laws 1866, chapter 836, the State acquired a permanent easement to flood the land after the lapse of one year from the time that the premises were flooded. *Smith & Powell Co. v. State*, 11 C. C. 87.

Periodical cessations in the continuity of the flooding caused by the erection of a dam, without intention of abandoning the right to flood or where the interruptions were due to the interference of others than the owner of the dam, does not affect the validity in any prescriptive rights acquired by such flooding. *Hall v. State*, 11 C. C. 109.

See EASEMENT; STATUTE OF LIMITATIONS.

PRIVATE RIGHT OF WAY. *See RIGHT OF WAY.*

PROFITS. *See CONTRACTS.*

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The State has placed limits upon the power of its officers to contract and incur indebtedness on its behalf. *Logan v. State*, 15 C. C. 161.

See also *Carroll v. State*, 15 C. C. 241.

Kirby v. State, 15 C. C. 246.

The State may ratify the unauthorized acts of its officers within the limits of constitutional restrictions. *Logan v. State*, 15 C. C. 161.

See also *Kirby v. State*, 15 C. C. 246.

Where the Attorney-General entered into a contract with an expert witness to testify in litigation against the State the expense of which exceeded the appropriation made for his use for such purposes his unauthorized acts will be deemed to have been ratified by the State by the passage of a statute making appropriations to meet the expense of such expert testimony. *Logan v. State*, 15 C. C. 161.

Where the Attorney-General entered into a contract with a stenographer to take the minutes and furnish copy in a litigation against the State in excess of the appropriation made for his use for such purpose his unauthorized acts will be deemed to have been ratified by the State by the passage of statutes making appropriations to meet the expense of such stenographic hire. *Carroll v. State*, 15 C. C. 241.

Where the Attorney-General makes a contract with a stenographer to take the evidence in a litigation against the State and these services continue after the close of his term, an appropriation to pay the services during his term is a ratification of the entire contract to the close of the litigation. *Carroll v. State*, 15 C. C. 241.

The office of the Attorney-General is a continuing one. Courts will therefore respect the official legal acts of the office itself without regard to the individual who may for a time be the incumbent thereof. *Kirby v. State*, 15 C. C. 246.

The Legislature in making appropriations for a current year for the Attorney-General's office could not foresee the exact amount required for all unanticipated emergencies and contingencies and provide specifically for the payment of each of them. It appropriates an amount for the contingent expenses of the office and leaves the Attorney-General, clothed with the authority of the Executive Law, to safeguard the interest of the State according to the necessities of each case as it arises. The Attorney-General being charged with a positive duty of defending actions brought against the State cannot justify a refusal to perform such duty on the ground that the Legislature has made no appropriation to meet an emergency which it could not foresee. *Kirby v. State*, 15 C. C. 246.

Where a statute authorizes a State Engineer to appropriate such property as in his judgment is necessary, he is required to act in good faith and with a sound discretion and not arbitrarily or capriciously, and an appropriation made without the exercise of a sound judgment which transcends the necessities of public use is unauthorized, illegal and void. *Ontario Knitting Co. v. State*, 15 C. C. 371.

Where the State Constitution provides that private property shall not be taken for public use without just compensation and that no person shall be deprived of property without due process of law and a statute

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for the construction of a State canal provides that the State Engineer shall take such property as in his judgment shall be necessary and the lines of the canal are fixed at the time of the appropriation, his judgment must be limited to the actual necessities of the canal as approved and legally planned and an appropriation outside of the lines of the canal though consented to by the owner, not necessary for spoil, buildings or other public purposes in connection with the construction and operation of the canal is unauthorized, illegal and void. *Ontario Knitting Co. v. State*, 15 C. C. 371.

The State is not estopped from questioning the acts of its engineer in making an appropriation when being vested with authority to make appropriations as shall in his judgment be deemed necessary he acts arbitrarily and without the exercise of a sound judgment and appropriates property that is not necessary for the public use. *Ontario Knitting Co. v. State*, 15 C. C. 371.

The claimant rendered certain legal services and incurred certain expenses in investigation and in preparation for the trials of certain actions growing out of the Great Meadow prison investigation. The claimant contended that he was orally designated on August 6, 1913, by former Governor William Sulzer, under and by virtue of section 8 of the Executive Law.

The right of the claimant to recover was challenged by the State on various grounds, but the Court did not find it necessary to pass upon these objections because it reached the conclusion that it had no jurisdiction to entertain the claim. One of the limitations upon the jurisdiction of the Court is, that it shall not extend to any claim submitted by law to any other tribunal or officer for audit or determination, except where the claim is founded upon express contract and has been in whole or in part rejected by such tribunal or officer. (See sections 264 of the Code of Civil Procedure.)

Under section 8 of the Executive Law, in order to obtain his compensation and expenses, claimant was required to obtain from the Governor an order and from the Comptroller a warrant before the Treasurer was authorized to pay him. Upon the refusal of any of these officers to observe the statute he had a remedy to mandamus to compel performance, and it was only upon their rejection of the claim in whole or in part that he could have recourse to the Court of Claims. The claim had never been rejected by any officer of the State, and the Court of Claims had therefore no jurisdiction to pass upon the same. *Whedon v. State*, 16 C. C. 33

This is a claim against the State for the sum of \$150 for services rendered the State in the month of April, 1914, by the claimant as special agent to the State Board of Tax Commissioners. In July, 1913, he was employed by the Commission as such agent at an agreed salary of \$150 per month. He received his pay to and including April 9, 1914, when his services were dispensed with. The check for \$45 which the Commission sent him to pay for the nine days in April, 1914, he promptly returned and notified the commission each day in that month

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that he was ready to perform work for the commission, if it would assign any to him.

The Court, construing certain correspondence between the claimant and the commission, held that the contract of hiring set forth in the correspondence was for what is known as a general and indefinite term, and that under such a contract the employee is liable to be dismissed by his employer at any time without previous notice and that his compensation ceases on the date of his dismissal. The claimant's recovery was therefore limited to \$45. *Quinn v. State*, 16 C. C. 70

Frank S. O'Neil, the claimant, was appointed a member of the Athletic Commission of this State on or about July 26, 1911, and continued as such up to October 8, 1915. In the latter year chapter 680 of the Laws of 1915 was enacted, taking effect May 22, 1915, providing that "Each member of the commission shall be entitled to receive an annual salary of three thousand dollars and his actual necessary traveling and other expenses incurred by him in the performance of his official duties." The Legislature, however, failed to make any appropriation to pay these salaries except an appropriation of \$9,000 for salaries commencing October 1, 1915. The question here involved is as to the right of the claimant to draw a salary for the period from May 22, 1915, to October 1, 1915.

The Court held that when the State, by statute, provides that an official shall receive a salary, that creates a specific and express contract between the State and that official, and is an obligation which cannot be avoided by the State simply because afterwards the Legislature either fails, neglects or refuses to make an appropriation to pay that salary. Claimant was therefore held to be entitled to an award for salary at the rate of \$3,000 per annum from and including the twenty-second day of May, 1915, to the first day of October, 1915. *O'Neil v. State*, 16 C. C. 74

QUAYLE, OLIVER A., v. STATE, 11 C. C. 44.

QUINN, PETER J., v. STATE, 16 C. C. 70

RAILING. *See* PERSONAL INJURY.

RAILROADS.

Construction of farm crossings by. *Maynard v. State*, 15 C. C. 291.

RAW MATERIAL.

See DAMAGE; PERMANENT APPROPRIATION.

RETAINER.

A retainer, in its legal sense, is a sum of money paid to secure the services of the person to be employed, and the sum named as a retainer is due as soon as the person retained accepts the employment. *Hough v. State*, 15 C. C. 146.

See CONTRACT.

RICE, ARVIN, AS RECEIVER, ETC., v. STATE, 11 C. C. 148.

RIGGS, MARGARET T. S., v. STATE, 13 C. C. 110.

RIGHT OF ACCESS *See* EASEMENT; HIGHWAY.

RIGHT OF WAY. *See* GOOD ROADS.

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Private right of way; as to constitutional provision providing complete scheme for securing. *Perkins v. State*, 15 C. C. 282.

RILEY, JAMES A., AND ANO., v. STATE, 15 C. C. 277.

RIPARIAN RIGHTS.

Where, in the construction of a canal in 1826, the State was authorized by statute to appropriate only such land and water as was necessary and there was no specific appropriation at that time defining the riparian rights acquired by the State except as might be inferred from the acts of the parties and general maps of the canal showing the blue line, only such riparian rights will be presumed to have been appropriated by the State as were authorized by the statute. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

There are four classes of ownership with respect to streams and bodies of water within the State, to wit: (1) those relating to streams and bodies of water which are absolutely owned by the State as public property; (2) those in which the State owns the bed of the stream and a public easement in its waters; (3) those in which the upland owner has title to the bed of the stream and the public have an easement in its waters, and (4) those in which the State has no interest whatever, the stream being the subject of absolute private ownership. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Where the State, in 1826, acquired riparian rights for a canal without a specific appropriation defining the rights acquired under a statute which authorized it to acquire such rights as were necessary, there remained in the original riparian owners such riparian rights as were not actually necessary for the maintenance and operation of the canal. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Wood Creek, which formed a part of the ordinary route of travel between the Hudson river and Lake Champlain from earliest times, and was used by the Indians and later by the colonists, was regarded as navigable, and in the patent from the English Crown to Philip Skene was excepted and reserved "as a common highway for the benefit of the public." Philip Skene having been attainted of treason by the Legislature of the State of New York in 1779, and his lands sold by the Commissioners of Forfeiture, those claiming under the Skene Patent have no interest in the bed of Wood Creek, and the State may take a portion thereof for its canal system without compensation to the riparian owners. *Johnson v. State*, 13 C. C. 55.

The claimants are the owners of uplands bounded upon the East river, and also claim to own certain lands under water, their claims being based upon patents issued by the Commissioners of the Land Office to them or their predecessors in title. Upon the Attorney-General's contention that the State may now appropriate the claimants' land under water for barge canal purposes without compensation, *Held*, that the claimants being the owners of uplands bounded upon the river are entitled to all of the riparian rights that are accorded to adjacent owners under the common law. That they have the right of access not only to the river itself, but to the freeway thereof, with the right to receive and

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ship goods over the same. That as such adjacent owners they are within the provisions of the Public Lands Law, persons to whom the Commissioners of the Land Office were given the power to grant lands under the waters of the river for the purposes mentioned in the Act. That it was under these circumstances the patents in question were issued and in reliance upon the validity thereof that the claimants have constructed a bulkhead and piers and filled the same in for the purposes of commerce. That as said bulkhead lines were established by the Harbor Commissioners, and the pierhead lines were established by Act of the Legislature and were approved by the Secretary of War, and all of the patents issued by the Commissioners of the Land Office to the claimants were within the lines so established and approved, the claimants are manifestly now entitled to compensation therefor. *Palmer v. State*, 15 C. C. 55.

Wood Creek was part of a natural system of water communication between the Hudson river and Lake Champlain. It was used as such from the earliest times by the Indians and later by the Colonists. During this time the use of the stream became dedicated to the public by reason of its having been used by the public from time immemorial. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

When in 1767 the English Crown granted certain lands, embracing Wood creek, to the patentees therein named, the Colonial authorities recognizing that Wood creek had been so used as a common water highway, and that the public by reason of such uses had acquired rights in it, the patent mentioned contained the reservation and exception "Excepting the said Wood Creek, which is reserved as a common highway for the benefit of the public." *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

After the Revolutionary War, Wood creek passed to the State of New York as the successor of the Crown, and the State received it "as a common highway for the benefit of the public," charged with the public easement therein, and its dedication to the public as a common highway for the benefit of the public. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

The status of Wood creek not having changed to the present time, the successors in title to the original patentee have no interest in the bed of said creek, and the lessees of land abutting on the creek have no right to build upon, or maintain over it, a private bridge for the transportation of merchandise. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

Wood creek being impressed with navigability by the original patent, the State of New York exercising its paramount right to improve a navigable stream, may take such creek, or portions of the same, for its canal system, without compensation to the owner of the land coming to its banks. *Champlain Stone and Sand Co. v. State*, 15 C. C. 181.

See PERMANENT APPROPRIATION.

ROAD MATERIAL.

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SALARY. *See* COURT OF APPEALS; WAGES.

SALINA STREET BRIDGE (SYRACUSE).

The State is not liable for the injuries received by a person who uses the towpath for the purpose of visiting the captain of a boat and in doing so falls into an opening underneath a lift bridge, where the opening was used in connection with the operation of the bridge, was necessary for that purpose, was located some distance from the traveled part of the towpath, and apparently necessarily exposed when the bridge was raised. *Scanlon v. State*, 11 C. C. 124. *See* *Ten Eyck v. State*, 11 C. C. 149.

The administrator's intestate was killed by falling into a pit at the Salina street bridge in the city of Syracuse.

On the evening of the accident the deceased was observed walking behind two women who were approaching the bridge in question. The bridge was being "lifted." When the women neared the bridge they stopped, stood slightly apart and the deceased walked between them and fell into a pit at the end of the bridge.

The accident happened about ten o'clock in the evening of June 3, 1907. The bridge was being raised at the time to permit the passage of canal boats. Before the operator began to raise the bridge a gong was sounded, and a flagman, while it was being raised, stood with a red lamp in his hand near the end of the bridge which the deceased approached. There were red lights on the bridge at the time, and under the needle beam at the ends of the bridge there were also red lights which were exposed when the bridge went up. *Held*, the State was not negligent, and the deceased was guilty of contributory negligence. *Clift v. State*, 13 C. C. 25. *See* *Mulvihill v. State*, 12 C. C. 17.

When the planking or floor of a canal bridge is about three inches above the surface of a contiguous street sidewalk, it is not such an inherently dangerous elevation that one would reasonably anticipate accidents therefrom; nor is it such a defect that common experience would naturally suggest that injury was likely to be caused by it. *Hynes v. State*, 13 C. C. 49.

See BRIDGES; NEGLIGENCE.

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Where a statute providing for the construction of good roads contained a provision that the cost of procuring the right of way should be paid by the Comptroller as a part of the cost of the improvement was amended by omitting the latter clause, thus placing the burden upon the county of obtaining the right of way, the amendatory act will not be given a retrospective effect so as to apply to highways in process of construction where condemnation proceedings are pending for the acquisition of the necessary right of way, in view of the Statutory Construction Law which provides that a repeal of a part of a statute should not affect or impair any act done or right accrued or acquired or liability, penalty, forfeit or punishment incurred prior to the time such repeal took effect, but that the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such repeal had not been effected, unless it clearly appears from the amendatory act that the Legislature intended that it should have a retroactive force and should apply to pending improvements and condemnation proceedings. <i>County of Schenectady v. State</i> , 13 C. C. 209.	
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SKANEATELES LAKE.	
The State may permanently maintain the water in Skaneateles lake to the height indicated by the canal board which appropriated the waters in 1843 and the State is not liable if the water rises at times through natural causes to a greater height. <i>Fitzgerald v. State</i> , 11 C. C. 117.	
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STATE PRINTING.

Where contracts for State printing have been made and the State has not authorized the submission of its liability under such contracts to the Court of Claims, such consent will not be implied from the language of the Code of Civil Procedure conferring jurisdiction upon the court. *Quayle v. State*, 11 C. C. 44.

See National Commercial Bank of Albany v. State, 13 C. C. 238.

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STATE STREET BRIDGE (BUFFALO).

Giambrone, Carmelia, and ano. v. State, 13 C. C. 212.

See NEGLIGENCE.

STATE STREET BRIDGE (SYRACUSE).

The claimant, a boy eleven years of age, was injured while stepping on the bevelled part of a steel girder of the State Street bridge in Syracuse. The accident occurred on November 27, 1907. The bridge was descending; it had been snowing and the snow was packed on the steel girder of the bridge mentioned. The bridge was coming down in jerks and when a short distance above the level of the street the claimant tried to get on it; in doing so he stepped upon the snow packed bevelled girder, slipped and was injured. There was a foot passage or sidewalk over the bridge at this time, which was intended for the use of, and could have been used by, pedestrians when the bridge was raised. *Held*, the claimant was *sui juris* and responsible for his acts. *Menapace v. State*, 13 C. C. 91.

See BRIDGES.

STATE RESERVATION (NIAGARA). *See* NIAGARA RESERVATION.

STATUTE.

The provision of the Canal Law (§ 37), allowing claims to be filed by any person sustaining damages from the canals, does not apply to an abandoned canal, like the Chemung canal, not enumerated among the canals to which the Canal Law by section 2 is made to apply. *Hughson v. State*, 11 C. C. 37.

Where a permanent easement to flood land has been acquired under the Revised Statutes (§§ 48, 52), Laws 1830, chapter 293, and Laws 1866, chapter 836, any claim for damages resulting from the flooding was not revived by Laws 1870, chapter 321, which applied only to a class of claims which had not been provided for previously. *Ely v. State*, 11 C. C. 65.

Section 37 of the Canal Law does not apply to the abandoned Chemung canal. *Hughson v. State*, 11 C. C. 37.

Revised Statutes, part I, chapter 9, title 9, sections 48, 52, construed in *Ely v. State*, 11 C. C. 65; *Kline v. State*, 11 C. C. 83; *Smith & Powell Co. v. State*, 11 C. C. 87.

Where in the construction of a canal the State was authorized by statute to appropriate only such land and water as was necessary and there was no specific appropriation defining the riparian rights acquired by the State except as might be inferred from the acts of the parties and

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general maps of the canal showing the blue line, only such riparian rights will be presumed to have been appropriated by the State as were authorized by the statute. *Fulton Light, Heat & Power Co. v. State*, 13 C. C. 285.

Where a statute providing for the construction of good roads contained a provision that the cost of procuring the right of way should be paid by the Comptroller as a part of the cost of the improvement was amended by omitting the latter clause, thus placing the burden upon the county of obtaining the right of way, the amendatory act will not be given a retrospective effect so as to apply to highways in process of construction where condemnation proceedings are pending for the acquisition of the necessary right of way, in view of the Statutory Construction Law which provides that a repeal of a part of a statute should not affect or impair any act done or right accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal took effect but that the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such repeal had not been effected, unless it clearly appears from the amendatory act that the legislature intended that it should have a retroactive force and should apply to pending improvements and condemnation proceedings. (L. 1908, ch. 115; amended L. 1906, chap. 468.) *County of Schenectady v. State*, 13 C. C. 209.

A claim for the balance due under a contract for work done by the claimant's assignor, part of which was rejected by the Comptroller, was brought within the jurisdiction of the court by amendatory act of 1908 (chap. 519) which provided that "The court has no jurisdiction of a claim submitted by law to any tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim or some part thereof has been rejected by such tribunal or officer." *National Commercial Bank v. State*, 13 C. C. 239.

The State enlarged the time within which a claim might be filed by an amendatory act which provided that: "As to claims which have heretofore been filed in the Court of Claims and which have been dismissed for lack of jurisdiction within three years last passed, the court shall have jurisdiction if the notice to file such claim is filed in the office of the Court of Claims and with the Attorney-General within six months and such claim is filed within one year after this section as amended takes effect." *National Commercial Bank of Albany v. State*, 13 C. C. 239.

The State expressly consented to submit its liability in a claim to the Court of Claims by an amendatory act which provided that: "The State hereby consents in all such claims to have its liability determined." (L. 1908, chap. 519.) Section 264 of the Code of Civil Procedure as amended in 1908 (chap. 519) confers jurisdiction upon the court over claims in tort constituting "private" claims against the State and grants the consent of the State to have its liability determined in the Court of Claims. *Burks et al. v. State*, 13 C. C. 153.

The term "private" as used in § 264 of the Code of Civil Procedure conferring jurisdiction upon the Court of Claims is used as the antithesis of "public." *Burks et al. v. State*, 13 C. C. 153.

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History of the statutes preceding the Barge canal act of 1903 relating to the appropriation of lands for canal purposes, the procedure under these acts, and the judicial decisions construing them, stated at length. *Adirondack Woolen Co. v. State*, 16 C. C. 1

In construing statutes it is the rule, where there is an opportunity for a difference of opinion as to the proper construction, to adopt that construction, other things being equal, which carries out some general public policy or serves some public interest. Following this rule, it seems proper to adopt the construction that under the Barge canal act title does not vest in the State until an appraisalment has been made and recorded or paid, that is, until a judgment has been entered in the Court of Claims, or paid, or until the Statute of Limitations has run, or an agreement has been made with the proper officials. This construction of the Barge canal act will not injure persons to the slightest extent whose property has been appropriated. They are guaranteed just compensation by the Constitution, and whatever the acts of the State, whether they be temporary or permanent in their character, a remedy exists in favor of those who have been injured. *Adirondack Woolen Co. v. State*, 16 C. C. 1

Chapter 658 of the Laws of 1915, authorizing the Court of Claims to hear, audit and determine the claim of an electrician employed by the State at a State hospital for the insane, for injuries alleged to have been sustained by him in the course of his employment, by reason of being struck by a patient, for which the State was not otherwise liable, and further providing that said claim, if found to be valid, shall constitute a legal and valid claim against the State, is constitutional.

Said act does not audit or allow the claim so as to violate section 19 of article 3 of the Constitution, nor does it give or loan money or credit of the State "to or in aid of any association, corporation or private undertaking" in violation of section 9 of article 8 of the Constitution, nor does it appropriate public moneys for local or private purposes within the meaning of section 20 of article 3 of the Constitution. *Munro v. State*, 16 C. C. (Appellate Division) 326

See CONSENT; ENABLING STATUTE; JURISDICTION.

STATUTE OF LIMITATIONS.

After the running of the Statute of Limitations property owners are presumed to have been compensated for damages to land through which the canal was built. *Keith v. State*, 12 C. C. 144.

Morgan and ano. v. State, 12 C. C. 38.

Where a dam was constructed in 1865 and flash boards had been used thereon ever since and no claim for flooding resulting therefrom was made by claimant until 1901, the claim is not tenable, as under the Revised Statutes (§§ 48, 52), and Laws 1830, chapter 293, and Laws 1866, chapter 836, the State acquired a permanent easement to flood the land after the lapse of one year from the time the premises were flooded. *Ely v. State*, 11 C. C. 65.

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A claim is not barred by the constitutional provision "that neither the Legislature, Canal Board, or any person or persons acting in behalf of the State shall audit, allow, or pay any claim which, as between citizens of the State, would be barred by lapse of time," where there is no evidence in the case from which to calculate the Statute of Limitations except the date of the expiration of the contract, which was within six years of the filing of the claim. *National Commercial Bank of Albany v. State*, 13 C. C. 239.

Prior to the Canal Law (L. 1894, ch. 338) the permanent appropriation of land was complete when the State took possession of the same and if no claim was made within a year after such appropriation the owner lost his interest in the property and the State acquired a title in fee. *Miller v. State*, 15 C. C. 266.

On September 27, 1900, the claimant, while in the employment of the State at the Kings Park hospital, was outside the hospital grounds looking after some electric wires. Two attendants had fifteen or twenty insane inmates at that place working on the public highway. As claimant passed them, one of the insane inmates struck him on the head with a shovel, knocking him to the ground and permanently injuring him. From the time he was injured up to October 1, 1915, he received monthly payments from the State amounting in all to \$3,716. In May, 1915, the Legislature passed an act, which was approved by the Governor, (chapter 658, of the Laws of 1915), whereby the damage suffered by the claimant was made a valid and legal claim against the State and the same was referred to the Court of Claims for determination.

The Attorney-General contended that this act of the Legislature was unconstitutional, because it revived a legal claim that had been barred by the general Statute of Limitations in violation of article 7, section 6, of the Constitution. The Court refused to uphold this contention on two grounds:

1. It was held that in the absence of the above statute the claimant would have had no cause of action against the State under the doctrine of the nonliability of charitable or eleemosynary institutions supported wholly or in part by the State or by a municipality for personal injuries sustained through the negligence or misconduct of an agent or servant of the institution; that, therefore, the claimant had no cause of action

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against the State until the same was created by the said statute, and that the statute was properly enacted by the Legislature under the power to validate and provide for the payment of claims otherwise not legally enforceable if they are supported by a moral obligation and founded upon justice.

2. It was further held that even if the claim could not be sustained on the above ground, the payments which the State has made to the claimant each month from the time of the injury up to October 1, 1915, were a recognition of the State's obligation and liability to the claimant, and would have been sufficient, as between citizens of the State, to take the claim outside of the Statute of Limitations and prevent its being barred by lapse of time. *Munro v. State*, 16 C. C. 149

In actions on State contracts to recover damages on items not embraced within the final estimate, the statute of limitations does not begin to run until the final estimate is made and filed.

I. M. Ludington Sons, Inc., 16 C. C. 175

See PRESCRIPTION; EASEMENT.

STEVENS, CHARLES, v. STATE, 13 C. C. 111.

STEVENS, CHARLES, v. STATE, 15 C. C. 301.

STEVENS, GEORGE A., v. STATE, 15 C. C. 304.

STOCK TRANSFERS. *See* TAXES AND ASSESSMENTS.

STONE CRUSHER. *See* CONTRACT.

STREAM. *See* RIPARIAN RIGHTS.

SUPERINTENDENT OF CANALS.

The State is liable for the arbitrary action of the canal superintendent in maintaining flash boards upon a State dam. *Cuykendall v. State*, 11 C. C. 143; *Dennis v. State*, 11 C. C. 143.

See CANAL; OFFICER.

TAFT, HENRY N., v. STATE, 13 C. C. 250.

TAX COMMISSIONERS, STATE BOARD OF. *See* CONTRACT; DAMAGE; NEGLIGENCE; PERSONAL INJURY; PUBLIC OFFICERS.

TAXES AND ASSESSMENTS.

The remedy against an erroneous tax or assessment which is not void for want of jurisdiction is an appropriate proceeding to review the tax or assessment. *Flower v. State*, 15 C. C. 161.

An action cannot be maintained to recover an erroneous tax or assessment where the assessors had jurisdiction, and the tax or assessment is not void until the tax or assessment has been set aside in an appropriate proceeding by the party commencing the action, and even in such cases there must not have been a voluntary payment of the tax or assessment before the proceedings were brought. *Flower v. State*, 15 C. C. 161.

An action may be maintained to set aside an illegal tax or assessment and to recover a tax or assessment paid thereunder, or, the tax or assess-

TAXES AND ASSESSMENTS — Continued.

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ment having been set aside, to recover the tax or assessment paid, where the assessors were without jurisdiction and the tax or assessment was void, provided the payment was involuntary, which is the case where the facts which rendered the tax or assessment illegal are outside the record and are unknown to the person paying the tax or assessment, or will not necessarily appear in any proceeding taken by the purchaser under a tax sale for nonpayment of the assessment to recover possession of the land or where the payment is made through coercion of law or of fact. *Flower v. State*, 15 C. C. 161.

An action cannot be maintained to recover an illegal tax or assessment even where the assessors were without jurisdiction and the tax or assessment was void where the payment was voluntary, which is the case where it was made purely under a mistake of law by the payor or where the illegality is based upon facts which appear upon the face of the proceedings which the person paying the tax or assessment had knowledge of or is presumed to have had knowledge of or is based upon facts outside the record of which he had actual knowledge and the payment is without compulsion, duress, fraud or misrepresentation on the part of the payee. *Flower v. State*, 15 C. C. 161.

Where the statute providing for a State tax on stock transfers which is constitutional is amended by a statute which is unconstitutional and which imposes a higher rate of taxation, the payment under the later statute in excess of that legally authorized without any protest or coercion is a mistake of law and the payment is a voluntary one and the excess paid cannot be recovered by suit without express legislation authorizing such a suit. *Flower v. State*, 15 C. C. 161.

Where a statute imposing a State tax upon stock transfers provides that the Comptroller may refund the amount of stamps erroneously affixed and cancelled, a suit against the State can not be maintained until this remedy has been exhausted, unless expressly authorized by statute. *Flower v. State*, 15 C. C. 161.

The Liquor Tax Law provides that the special deputy commissioner shall deposit excise moneys in a bank or other depository in a separate account in his official name entitled "Liquor Tax Moneys." It further provides that one-half of the revenue resulting from taxes, fines and penalties under the provisions of the Liquor Tax Law shall be paid by the special deputy commissioner within ten days from the receipt thereof to the treasurer of the State of New York, and the remaining one-half to the town or city in which the traffic was carried on from which the revenues were received. The statute further provides that the interest accruing on this account until its apportionment by the special deputy commissioner shall belong to the State and that any interest accumulating after its apportionment shall belong to the State and the locality in equal shares.

The scheme of the statute seems to be that while the moneys are unapportioned the State shall be entitled to the accrued interest on the undivided funds. The Excise Commissioner is not required to wait ten days before the distribution of the money but may distribute it at any time within the ten days or may deposit the moneys in separate accounts.

TAXES AND ASSESSMENTS — Continued.

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Where the deposit is so made, the State and the city are each entitled to the interest which accumulates on its account. In two instances the Excise Commissioner opened separate accounts and in these cases the State should remit the interest which was paid to it by the bank on the account opened in the name of the city. This interest amounts to the sum of \$280.68 for which the city of New York is entitled to an award with interest thereon from the date of its receipt by the State.

City of New York v. State, 16 C. C. 21

Upon appeal, the Appellate Division held that under section 10 and subdivision 17 of section 12 of the Liquor Tax Law, taxes, fines and penalties collected by and paid to the special deputy commissioners of excise in the city of New York are to be divided equally between the State and city, said commissioners having ten days in which to divide the money and pay one-half thereof to the State and the city. In the meantime, the statute provides that all such moneys shall be deposited in designated banks, and that all interest accruing on such "undivided excise moneys * * * and all interest accruing on the part thereof apportioned to the State shall belong to the State of New York." The law regards that as done which ought to have been done and the deputy commissioners of excise by failing to divide the moneys until after the expiration of ten days in violation of the statute, cannot deprive the city of interest on the moneys deposited. The most that the State can claim is interest on the full deposits for ten days after they were received by the deputy commissioners.

City of New York v. State, 16 C. C. 315

See PERMANENT APPROPRIATION.

TAYLOR, CHARLES B., AND ANO., v. STATE, 15 C. C. 305.

TEMPORARY APPROPRIATION.

Where the State took possession of land for the purpose of constructing a feeder but filed no map of the land and there was no evidence of a permanent appropriation, the possession constitutes a temporary appropriation for which the owner or tenant, according to the facts, is entitled to the value of the use of the land. Morgan and ano. v. State, 11 C. C. 38.

TENANT.

Where a tenant is in possession of land, and continues in possession without written notice of an appropriation and by agreement with proper State officials, sows his crops and is prevented from harvesting them by a notice to vacate, he is entitled to recover the value of such crops. Lynch v. State, 12 C. C. 36.

The State appropriated for the purposes of the new Barge canal the property of D. Before the appropriation D had leased the property to the claimant B, which lease was duly recorded in the county clerk's office of the county where the property was situated. The lease had five years to run at the time of the appropriation. B, the lessee and claimant, was in the possession and occupancy of the property when it was appropriated. After the appropriation the State made a settlement with D, the owner and lessor, paying him an agreed sum for the property. B, the

TENANT — Continued. Page.

lessee, in possession and occupancy under the recorded lease, was not settled with. *Held*, that any settlement under such conditions, with the owner, D, by the State, could not affect the rights of the claimants, and that they were entitled to recover the value of their lease at the time of the appropriation. *Baker and ano. v. State*, 13 C. C. 22.

See LANDLORD AND TENANT; PERMANENT APPROPRIATION.

TEN EYCK, LOUIS, AND ANO., v. STATE, 11 C. C. 149.

TITLE.

The statutes preceding the Barge canal act and the decisions made thereunder are uniform in holding that the title did not vest when the State entered upon the land and thereby appropriated it, but rather when the award had been made and recorded or the Statute of Limitations had run against the owners of the property. This unbroken record of statutory enactment and judicial decisions should have great weight in interpreting the Barge canal act in view of the omission from that statute of any express language prescribing when the title shall vest in the State. *Adirondack Woolen Co. v. State*, 16 C. C. 1

The Legislature, of course, may provide for the passing of title in advance of payment if adequate provision is made for such payment and a proper tribunal afforded for determining the compensation; but the general rule is that title does not pass until payment or tender, or until the Statute of Limitations has run. *Adirondack Woolen Co. v. State*, 16 C. C. 1

TONAWANDA CREEK.

- Hazzard v. State*, 15 C. C. 260.
- Pierce v. State*, 15 C. C. 260.
- Rossow v. State*, 15 C. C. 260.
- Miller v. State*, 15 C. C. 266.

TONAWANDA FEEDER.

Where the State constructs a feeder connecting two distinct water sheds and negligently maintains the feeder so that it overflows and damages, the State is liable for the damage which it negligently occasions but not for any damage produced by natural causes which would have occurred irrespective of its own negligence. *Acer v. State*, 11 C. C. 72.

- Gray v. State*, 12 C. C. 71.
- McDonald v. State*, 12 C. C. 79.
- Ostrander, J. N., v. State*, 11 C. C. 175.
- Ostrander, Charles, v. State*, 11 C. C. 72.
- Zimmerman v. State*, 12 C. C. 88.

See also *Acer v. State*, 16 C. C. 50

TOWN OF WHITESTOWN v. STATE, 13 C. C. 269.

TRANSPORTATION.

See CONTRACT; DAMAGE; HIGHWAY.

TREES.

As to damages recoverable where land appropriated was orchard land, see DAMAGES.

TRESPASS.

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The claimant for some years prior to May 1, 1913, owned a small tract of land on a public highway. Her premises were located on a precipitous hill rising abruptly from the highway at an angle of about 45 degrees. A stone retaining wall ran along the base of the hill in front of claimant's premises. In July, 1912, the construction of an improved State highway on the general site of the existing highway began. The highway contractor, following the plans and specifications of the State, by means of a steam shovel removed the retaining wall in front of claimant's premises and took away a portion of the hillside back of it. The result was that about the end of April, 1913, the greater portion of the hill slid down, wrecking claimant's house and barn and ruining her property.

The Court found as a fact that the excavation by the contractor at the base of the hill went beyond the line of the highway and intruded within the close of the claimant, and held that this constituted a trespass on her premises, and that for the proximate consequence of this direct trespass the liability of the State was undoubted. *Koerner v. State*, 16 C. C. 92

TRIBUNAL. *See* JURISDICTION; STATUTE OF LIMITATIONS.

TUTTLE, ORLEY C., v. STATE, 16 C. C. 87

TWENTY-THIRD STREET BRIDGE (WATERVLIET).

Where the alleged defects in an approach to a bridge are produced by natural wear and natural conditions and are so slight as not to constitute actionable negligence, the claim should be dismissed. Where the claimant seeks to magnify the alleged defects so as to charge the State with notice and take the claim out of the above rule by showing that others had fallen upon the same step before the accident to claimant, the evidence will not avail him where it does not appear what the weather conditions were at those times. *Taft v. State*, 13 C. C. 250.

UNITED STATES LOAN COMMISSIONERS.

Where, in the sale of certain real estate belonging to the State, the claimant alleged that he procured a purchaser for the land in pursuance of an agreement of brokerage with the United States Loan Commissioners of the county of New York: *Held*, that the Loan Commissioners had no right to make such contract with the purchaser. *Mayer v. State*, 11 C. C. 197.

VAN ALSTYNE, JESSIE M., v. STATE, 11 C. C. 157.

VAN AMBER, MELVILLE W., v. STATE, 12 C. C. 68.

VAN SLYKE'S BRIDGE.

Beeman v. State, 16 C. C. 153

VILLAGE OF WHITEHALL v. STATE, 13 C. C. 139.

VOGEL, JOHN, v. STATE, 11 C. C. 151.

WAGES. Page.

The State may by statute fix the compensation and hours of labor of its employees. *Campbell v. State*, 12 C. C. 9.

An employee on a State scow was held entitled to recover for extra compensation where his right thereto had not been waived by him. *Campbell v. State*, 12 C. C. 9.

A locktender who receives less than the prevailing rates of wages prescribed by statute or works more than the number of hours constituting a day's work by statute (L. 1870, chap. 385; L. 1894, chap. 622) is entitled to recover the difference between the compensation to which he was entitled by the statute and the amount which he actually received. *McCammon v. State*, 12 C. C. 20.

In 1893 and 1894 the claimant was a lock-tender on the Erie canal at a monthly salary of \$42.50. He worked twelve hours a day and now claims that under chapter 385 of the Laws of 1870, being an act to regulate the hours of labor of mechanics, workmen and laborers in the employ of the State, he was entitled to pay for overtime, that the \$42.50 a month which he received was simply pay for a month's work composed of days of eight hours each instead of twelve hours, and therefore he is now entitled to \$21.25 per month in addition to what he has already received.

The Court upheld the contention of the claimant on the authority of *McCammon v. State of New York*, 12 Court of Claims Reports 20, affirmed in 117 App. Div. 913.

The State contended that lock-tenders cannot be considered mechanics, workmen or laborers within the purview of the above statute. The Court, however, held that the word "workmen" is sufficiently broad in scope to include lock-tenders receiving \$42.50 per month. *Wright v. State*, 16 C. C. 85

Upon appeal, the Appellate Division modified the award by limiting the additional compensation to that received subsequent to May 10, 1894.

The Appellate Division held that under chapter 385 of the Laws of 1870, providing that eight hours shall constitute a legal day's work, extra compensation cannot be demanded in the absence of an agreement therefor previously made by the parties.

Hence, a locktender employed by the State of New York who worked for a continuous period of twelve hours per day and accepted pay at the rate of forty-two dollars and fifty cents per month, without objection and without demand or request that he be required not to work more than eight hours per day, is not entitled to compensation for the four hours a day overwork at the prevailing rate of wages for laborers during said period in the vicinity, which was one dollar and fifty cents per day of eight hours.

But since the amendment of said statute by chapter 622 of the Laws of 1894, providing that "laborers so employed shall receive not less than the prevailing rate of wages in the respective trades or callings in which such mechanics, workmen and laborers are employed in said

WAPLES, W. L., COMPANY v. STATE — Continued. Page.
locality," said locktender is entitled to such additional compensation for services rendered subsequent to the day when such amendment became effective.

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WATER COURSES. See RIPARIAN RIGHTS.

WEST MAIN STREET BRIDGE (ROCHESTER).

Where it appeared that the claimant, a boy of eight years of age and upwards, stood deliberately at the end of a lift bridge and placed his foot upon the flagstone on which the iron girders would descend when the bridge was lowered, and the descent of the bridge when lowered was not rapid but required thirty seconds to descend eleven feet; that the descent would have attracted the notice of any person standing near it whose attention was not otherwise engaged; that claimant failed to take that prudence and care which even a child of that age ought to have done; that the descent was slow enough so that if he had noticed the girder even when it was descending to the height of his head or shoulders there was plenty of time to have removed himself from the place of danger: *Held*, that claimant was guilty of contributory negligence and is not entitled to recover for the injury received because of such contributory negligence on his part. Bristol v. State, 11 C. C. 14.

Where an employee of the State in charge of a lift bridge over the Erie canal gave warning to claimant intending to cross the bridge that it was about to be raised by giving the warning signal and also the danger signal by swinging his lamp and that notwithstanding the warning the claimant, who was riding a bicycle, came upon the bridge, and that after he was upon said bridge was again warned to stay on as he had not time to cross before it would be raised, but kept on and rode to the other end of the bridge and was thrown to the pavement below and injured: *Held*, the employees of the State in charge of the bridge were not negligent in operating the same and that claimant, in attempting to cross the bridge after the warning signals had been given and after the bridge tender had warned him not to proceed further, was guilty of contributory negligence and cannot recover. Gillette v. State, 11 C. C. 20.

See BRIDGES; PERSONAL INJURY.

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